Schools in Name Only: The Role of the Federal Judiciary in Remedying Our Nation's Unconstitutional Schools

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"This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."[1]

I. INTRODUCTION

Every day, eighteen-year-old Gary B. wakes up in an extremely segregated city[2] and tries his best to learn at a wildly underperforming school.[3] He attends Osborn Evergreen Academy of Design and Alternative Energy in Detroit, Michigan and is currently in his senior year.[4] Osborn Evergreen Academy is attended by almost *one hundred percent* minority students,[5] of which *zero percent* have attained proficiency in mathematics, science, and social studies.[6] Ironically, the school's mission statement includes a focus on "academic rigor."[7]

Gary is not alone, nor is Osborn Evergreen Academy the only Detroit school performing at such an abysmal level.[8] Other Detroit students attend similarly

[1] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring).

[2] EDBUILD, FAULT LINES: AMERICA'S MOST SEGREGATING SCHOOL DISTRICT BORDERS 14 (2016), https://s3.amazonaws.com/edbuild-public-data/data/fault+lines/EdBuild-Fault-Lines-2016.pdf [https://perma.cc/X2SX-DKGQ] ("[T]he most segregating school district border in the country separates Detroit Public Schools, where 1 in 2 children live in poverty, from the Grosse Pointe Public School System, where just 1 out of every 15 children comes from an impoverished household.").

[3] *See* Complaint at 19–20, 59, Gary B. v. Snyder, 329 F. Supp. 3d 344 (E.D. Mich. 2018) (No. 16-CV-13292).

[4] *Id.* at 2, 19.

[5] *Osborn Evergreen Academy of Design and Alternative: Overview*, U.S. NEWS & WORLD REP., https://www.usnews.com/education/best-high-schools/michigan/districts/detroit-city-school-district/osborn-evergreen-academy-of-design-and-alternative-143142 [https://perma.cc/5LBD-KN3D].

[6] Complaint, *supra* note 3, at 65.

[7] MICH. DEP'T EDUC., REDESIGN PLAN: OSBORN EVERGREEN ACADEMY OF DESIGN AND ALTERNATIVE 4 (2013), https://www.michigan.gov/documents/mde/DPS._Osborn_Evergreen_Acad.Posted_Plan.03.27.14_452314_7.pdf [https://perma.cc/NDP8-UUSM].

[8] *See* Complaint, *supra* note 3, at 2, 7.

segregated and equally low-performing schools.[9] They attend two Detroit Public Community District schools[10] and two Detroit-area public charter schools.[11] In these buildings, student proficiency rates "hover near zero in nearly all subject areas."[12] Many of the students who attend them cannot read, write, or comprehend grade-appropriate material.[13] Illiteracy is the norm.[14]

In addition to these low proficiency rates, Gary and his friends are denied access to basic educational resources and safe facilities.[15] Their schools lack textbooks altogether or contain only a few copies of outdated books that must be shared by groups of four or more students.[16] School supplies, and even toilet paper, are scarce; these necessities are often only available to students if teachers purchase them on their own dime.[17] Classrooms do not have enough chairs and desks for the fifty-student classes crowding them,[18] and the schools are plagued by rodent infestations, extreme classroom temperatures, mold, and contaminated drinking water.[19]

These are "schools in name only."[20]

[9] *Id.* at 2.

[10] The schools are Osborn Academy of Mathematics and the Medicine and Community Health Academy at Cody. *Id.*

[11] *Id.* The public charters implicated in the complaint include Hamilton Academy and Experiencia Preparatory Academy—the latter closed after the complaint was filed. *See* Kate Wells, *Three Detroit Charter Schools Are Closing This Year*, MICH. RADIO (June 28, 2016), http://www.michiganradio.org/post/three-detroit-charter-schools-closing-year [https://perma.cc/BT6Z-8TGZ].

[12] Complaint, *supra* note 3, at 4 (emphasis omitted). Indeed, "[e]ach currently open school's eleventh graders has *0%* proficiency in at least one of Math, Science, or Social Studies." *Id.* at 7.

[13] *Id.* at 4. At Osborn Academy of Mathematics, 12% of students are proficient in English Language Arts (ELA), and less than 4% are proficient in mathematics. At the Medicine and Community Health Academy at Cody, fewer than 7% of students are proficient in math, and only about 20% of students are proficient in ELA. At Hamilton Academy, fewer than 10% of students are proficient in ELA, and less than 6% of students are proficient in math. *See* Mich. Dep't of Educ., *School Index Proficiency*, MI SCHOOL DATA, https://www.mischooldata.org/SchoolIndex/Proficiency.aspx [https://perma.cc/N4ZW-L7XR] (type the desired school name in the "Search for a School" bar at the top of the page; choose the desired school from the list; and select "proficiency index" on the next page).

[14] Complaint, *supra* note 3, at 4.

[15] *Id.* at 8–9.

[16] *Id.* at 8.

[17] *Id.* at 8–9.

[18] *Id.* at 9.

[19] Cathy Free, *Detroit's Public Schools Are in Crisis: Students and Teachers Deal Daily with Rats, Mold and No Heat*, PEOPLE (Feb. 3, 2016), https://people.com/celebrity/detroits-public-schools-are-in-crisis-rats-mold-and-no-heat/ [https://perma.cc/AUZ6-5GXS]; Alicia Guevara Warren, *Deplorable School Conditions: Investing in the Future of Kids in Detroit and All of Michigan*, MICH. LEAGUE FOR PUB. POL'Y (Mar. 25, 2016), https://mlpp.org/deplorable-school-conditions-investing-in-the-future-of-kids-in-detroit-and-all-of-michigan/ [https://perma.cc/632U-H94L].

[20] Complaint, s*upra* note 3, at 1.

Dismayed by these poor conditions and academic outcomes, Gary and six other school-aged children brought a class action suit in federal court against Michigan's then-governor, Rick Snyder, and state education officials in 2016.[21] They advanced a novel argument for a constitutional right to access literacy education.[22] The students assert that Michigan has failed to provide their schools with "the capacity to deliver access to literacy" through evidence-based literacy instruction and adequate school conditions, and they argue that they have been functionally excluded from the statewide system of public education.[23] Since their schools are comprised almost exclusively of minority students, they also contend that the defendants have violated the Constitution by discriminating (either intentionally or with deliberate indifference) on the basis of the students' race.[24]

The students asked the federal judiciary to acknowledge that the Fourteenth Amendment guarantees the "fundamental right of access to literacy" and that defendants' policies and practices violate the Substantive Due Process Clause, the Equal Protection Clause, and Title VI of the Civil Rights Act of 1964.[25] They also requested the court to order the State of Michigan to provide evidence-based literacy instruction at all grade levels, to address school conditions that impair students' access to literacy, and to establish a statewide accountability system to assess and monitor conditions that deny access to literacy.[26]

U.S. District Court Judge Stephen Murphy III declined to issue these requested remedies.[27] Although he acknowledged that the conditions and outcomes at these Detroit schools are "nothing short of devastating,"[28] he nevertheless granted the defendants' motion to dismiss the claim.[29] Because "the Supreme Court has neither confirmed nor denied that access to literacy is a

[21] *Id.* at 17–23. The State of Michigan took control of Detroit's public schools on March 26, 1999, and the state governor has appointed the Detroit school board ever since. Monte Piliawsky, *Educational Reform or Corporate Agenda? State Takeover of Detroit's Public Schools*, *in* COUNTERPOINTS, THE FUTURE OF EDUCATIONAL STUDIES 265 (Beth Hatt-Echeverria et al. eds., 2003).

[22] The Court has not yet acknowledged either the fundamental right to literacy or the right to a minimally adequate education. *See infra* Part II.

[23] *See* Complaint, *supra* note 3, at 19–20.

[24] *Id.* at 1, 42–43.

[25] *Id.* at 120–21.

[26] *Id.* at 128–29.

[27] Lorelei Laird, *Judge Dismisses Lawsuit Alleging Constitutional Right to Literacy; Plaintiffs Vow Appeal*, A.B.A. J. (July 3, 2018), http://www.abajournal.com/news/article/judge_dismisses_lawsuit_alleging_constitutional_right_to_literacy_plaintiff [https://perma.cc/WYX9-HRVH].

[28] Gary B. v. Snyder, 329 F. Supp. 3d 344, 366 (E.D. Mich. 2018).

[29] Jacey Fortin, *'Access to Literacy' Is Not a Constitutional Right, Judge in Detroit Rules*, N.Y. TIMES (July 4, 2018), https://www.nytimes.com/2018/07/04/education/detroit-public-schools-education.html [https://perma.cc/LF4V-8PBQ].

fundamental right,"[30] he concluded that precedent does not require states to "affirmatively provide each child with a defined, minimum level of education by which the child can attain literacy[.]"[31]

This dismissal repeats other federal court decisions that have similarly avoided recognizing that kids like Gary have the right not to be forced to attend segregated, failing schools.[32] Nor are the five schools named in this case unique.[33] Countless American students continue to attend racially segregated schools that fail to provide even basic levels of proficiency in core subject areas.[34]

Brown v. Board of Education announced a federal constitutional right to equal educational opportunity, but ever since, the federal judiciary has both chipped away at that right and withdrawn the remedies that proved to be effective in securing it.[35] As a result, thousands of students across the United States have no option but to attend racially (and socioeconomically) segregated, failing schools.[36] Neither school-based reform strategies nor state court remedies have been able to slow mounting resegregation and declining student achievement in our nation's public schools.[37] In fact, these inequities have steadily intensified in recent decades.[38] With no other viable option, Gary B. and his peers asked the federal judiciary to affirm a new fundamental, federal constitutional right.[39]

[30] *Gary B.*, 329 F. Supp. 3d at 363.

[31] *Id.* at 366.

[32] *See generally* Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83 (2010) (showing a noticeable decline in federal court outcomes for education adequacy plaintiffs since 2005).

[33] *See, e.g.*, Tyler Durden, *13 Baltimore High Schools Have Zero Students that Are Proficient in Math*, ZEROHEDGE (Nov. 9, 2017), https://www.zerohedge.com/news/2017-11-09/13-baltimore-high-schools-have-zero-students-are-proficient-math [https://perma.cc/47YX-2MKX] (finding that thirteen of thirty-nine Baltimore City Schools have zero students who tested proficient in math on state assessments).

[34] *See* Appendices A–D. These charts demonstrate that 35,719 students attend more than 86 such schools across just four U.S. public school districts. The tables depict one district from the East Coast (Baltimore, Maryland), one from the Midwest (Columbus, Ohio), one from the South (Jacksonville, Florida), and one from the West Coast (Oakland, California). Each graph aggregates student literacy proficiency and school composition by race and socioeconomic class.

[35] *See infra* Part II.

[36] *See* CHANDI WAGNER, CTR. FOR PUB. EDUC., SCHOOL SEGREGATION THEN & NOW: HOW TO MOVE TOWARD A MORE PERFECT UNION 2–12 (Jan. 2017), https://www.nsba.org/-/media/NSBA/File/cpe-school-segregation-then-and-now-report-january-2017.pdf [https://perma.cc/7QGF-KAVM].

[37] *See infra* Part III.

[38] *Id.*

[39] Alia Wong, *Students in Detroit Are Suing the State Because They Weren't Taught to Read*, ATLANTIC (July 6, 2018), https://www.theatlantic.com/education/archive/2018/07/no-right-become-literate/564545/ [https://perma.cc/Q66U-NXFU] ("The case is indicative of a new chapter in American education in which advocates, frustrated with

Although these students experienced an initial setback at the district court, the United States Court of Appeals for the Sixth Circuit heard their appeal in October of 2019.[40] Because the *Gary B.* case asserts that literacy is a necessary condition for fulfilling other constitutional rights, the appeals court confronted a novel argument for education rights.[41] The Public Counsel Law Center and legal powerhouses Mark Rosenbaum, Carter Phillips, and Erwin Chemerinksy crafted this unique approach,[42] which has garnered support from the ACLU, the American Federation of Teachers, and even Detroit Public Schools Community District, who each authored amici curiae in support.[43] In light of these circumstances, many legal scholars predict that the case is "ultimately destined for the Supreme Court."[44]

To determine whether to acknowledge the right to a minimally adequate literacy education, the Court will undoubtedly grapple with the appropriateness and the administrability of court-ordered remedies. This Note considers why the federal judiciary should intervene and examines how it can issue effective decrees by drawing on past practices. Part II describes the race-based education right afforded by *Brown*, analyzes how subsequent cases diluted that right, and examines how dicta from those cases preserve the right to a minimally adequate education. Part III traces how the federal judiciary drastically reduced public school segregation after *Brown* in a single generation through judicial decree, but shortly thereafter enabled resegregation by releasing those decrees. The effects of both racial and socioeconomic resegregation on the current

persistent achievement gaps and glaring disparities in school quality despite efforts to combat those problems, are resorting to unconventional means to bring about change.").

[40] *See* Erin Einhorn, *How a Lawsuit over Detroit Schools Could Have an 'Earth-Shattering' Impact*, NBC NEWS (Oct. 28, 2019), https://www.nbcnews.com/news/us-news/how-lawsuit-over-detroit-schools-could-have-earth-shattering-impact-n1072721 [https://perma.cc/SZM7-8DLT].

[41] Wong, *supra* note 39. ("If someone is functionally illiterate—unable to read at grade level—then how can we expect them to meaningfully engage in the rest of their explicit constitutional rights? . . . How can we expect them to meaningfully participate in our government and exercise the right to vote and the right to free speech if their ability to obtain information and evaluate that information is so limited because the public schools that they attended did not even given them an opportunity to become literate?" (internal quotations omitted)).

[42] *The Lawsuit: Legal Team*, RIGHT TO LITERACY: DETROIT, https://www.detroit-accesstoliteracy.org/legal-team/ [https://perma.cc/XN5U-RA2V].

[43] Brief for the American Civil Liberties Union of Michigan as Amicus Curiae Supporting Appellants, Gary B. v. Snyder, No. 18-1855/18-1871 (Nov. 26, 2018); Brief for American Federation of Teachers as Amicus Curiae Supporting Plaintiffs-Appellants, Gary B. v. Snyder, No. 18-1855/18-1871 (Nov. 26, 2018); Brief for Detroit Public Schools Community District as Amicus Curiae Supporting Plaintiffs-Appellants, Gary B. v. Snyder, No. 18-1855/18-1871 (Nov. 26, 2018).

[44] *See, e.g.*, Vikram David Amar, *In a Case with Blockbuster Potential, Detroit School Children Assert a Federal Constitutional Right to Literacy*, JUSTIA: VERDICT (Sept. 23, 2016), https://verdict.justia.com/2016/09/23/case-blockbuster-potential-detroit-school-children-assert-federal-constitutional-right-literacy [https://perma.cc/X4XL-U7BE].

educational landscape are also discussed. Part IV explores the right to access a minimally adequate literacy education advanced by *Gary B. v. Snyder* and enhances that argument by defining the schools that violate it narrowly. Part V proposes that when schools violate this right, federal judges should use a proven, practical strategy and order local school districts to implement socioeconomic integration programs. Part VI briefly concludes by imploring the federal judiciary to secure at least minimal education opportunities for all American children—regardless of their race, class, or neighborhood.

II. *BROWN*, ITS PROGENY, AND THE CURRENT STATE OF THEIR COLLECTIVE GUARANTEES

The Supreme Court first recognized a right to equal education in the landmark case *Brown v. Board of Education*,[45] but it has retreated from that acknowledgement ever since. Through subsequent decisions, the Court differentiated between unlawful racial discrimination and permissible segregation, drastically reducing state obligations to provide equal education and even limiting voluntary efforts.[46] But within these race-based holdings exists essential language regarding the constitutional right to a minimally adequate education, a right distinct from race that offers potential relief for the thousands of American students who are trapped in our nation's lowest-performing schools.[47]

A. *Race-Based Education Rights*

In *Brown*, the Warren Court overturned the long-standing separate-but-equal doctrine and held that racially segregated public schools violate the Equal Protection Clause of the Fourteenth Amendment.[48] With this decision, the Court struck down state-sanctioned de jure segregation, outlawing states' purposeful racial discrimination in operating public education systems.[49] The Court did not articulate its holding in these terms, though; in fact, it proscribed racial isolation *whenever* the state offers public education.[50] However, because the Court did not specifically address whether students had the right to protection from de

[45] Brown v. Bd. of Educ., 347 U.S. 483, 483–93 (1954).

[46] *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1609–15 (2003).

[47] *See infra* Part II.B.

[48] *Brown*, 347 U.S. at 495.

[49] Michael Heise, *Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863, 869 (2008).

[50] *Brown*, 347 U.S. at 493 ("Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

facto segregation,[51] it left the *Brown* right vulnerable to future limiting decisions.[52]

Roughly twenty years later, the Court did indeed retreat from the original scope of the *Brown* right in three key cases. First, in *Milliken v. Bradley*, the Court explicitly held that segregated schools were constitutional so long as states did not specifically sanction race-based separation of students, formally removing de facto segregation from the previously articulated constitutional right afforded by *Brown*.[53] Many argue that this distinction between de jure and de facto segregation is meaningless.[54] Regardless, *Milliken* put an end to successful segregation claims under *Brown*, absent an overtly discriminatory state law.

Second, in *San Antonio Independent School District v. Rodriguez*, the Court held that public school funding disparities do not violate either equal protection or the *Brown* guarantee, even though those funding disparities result in separate and unequal schools.[55] This ruling tacitly endorsed unchecked de facto

[51] De facto segregation results from policies and laws that are not overtly discriminatory, and from other factors like personal choice and socioeconomic class. *See* Richard Rothstein, Commentary, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods—A Constitutional Insult*, ECON. POL'Y INST. (Nov. 12, 2014), https://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/ [https://perma.cc/33LB-7MFB].

[52] *See* Richard D. Kahlenberg, *Socioeconomic School Integration through Public School Choice: A Progressive Alternative to Vouchers*, 45 HOW. L.J. 247, 261–63 (2002).

[53] Milliken v. Bradley, 418 U.S. 717, 746–47 (1974) ("Unless [the state] drew the district lines in a discriminatory fashion, or arranged for white students [to attend white-only schools], they were under no constitutional duty to make provisions for Negro students to do so."). Moreover, only direct evidence of intent to segregate would meet the burden of proof; circumstantial evidence was deemed insufficient. *See id.* at 737–53.

[54] These critics argue that residential isolation by race and class is not merely "the accident of economic circumstance, demographic trends, personal preference, and private discrimination," but instead results from the long legacy of racially motivated government policies "whose effects endure to the present." Rothstein, *supra* note 51; *see also* Jake Blumgart, *Housing Is Shamefully Segregated. Who Segregated It?*, SLATE (June 2, 2017), https://slate.com/business/2017/06/an-interview-with-richard-rothstein-on-the-color-of-law.html [https://perma.cc/4RZM-Z98W] (discussing the effects of housing segregation with Richard Rothstein, who argues that because these policies violate the Constitution, the federal government is responsible for permitting local authorities to perpetuate them, and concluding that the federal government should remedy the injury); Valerie Strauss, Brown v. Board *Is 63 Years Old. Was the Supreme Court's School Desegregation Ruling a Failure?*, WASH. POST (May 16, 2017), http:www.washingtonpost.com/news/answer-sheet/wp/2017/05/16/the-supreme-courts-historic-brown-v-board-ruling-is-63-years-old-was-it-a-failure/?noredirect=on&utm_term=.222849842aad [https://perma.cc/J7VB-5VZX] (arguing that neighborhood segregation resulted from intentional government policy at the federal, state, and local levels during the mid-twentieth century and that residential patterns are now solidified as a result).

[55] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23–24 (1973). At the time of *Rodriguez*, the government's per-pupil spending was roughly 15% to 20% more for white students than it was for black students. Chemerinsky, *supra* note 46, at 1610.

segregation by wealth,[56] thereby creating a significant obstacle to desegregating public school systems in the North.[57] At the same time, the Court also removed suburban districts from involvement in any de jure remedy, which substantially limited the impact of effective solutions to even the most overt discrimination.[58]

Although the Court absolved the states of an affirmative responsibility to reduce racial isolation, some school districts continued to work towards integration voluntarily through race-conscious student assignment plans.[59] In response, both the circuit courts[60] and the Supreme Court[61] began striking down these policies in the 1990s, ruling that they were not sufficiently tailored to a state interest and therefore could not pass constitutional muster.[62] That approach culminated a few years later in *Parents Involved in Community Schools v. Seattle School District*,[63] where the Court explicitly upheld *Milliken*'s de jure–de facto distinction[64] and forbade district integration plans from categorizing

[56] For an explanation of how advocates feared this decision would impact *Brown*'s race-based education right, see Jeffrey S. Sutton, San Antonio Independent School District *and Its Aftermath*, 94 VA. L. REV. 1963, 1970 (2008) (noting that in his dissent, Justice Marshall worried "that the promises of *Brown* would never be fulfilled unless the courts not only eliminated de jure segregation by race but also curbed the effects of de facto segregation by wealth").

[57] Chemerinsky, *supra* note 46, at 1610 ("[R]equiring proof of discriminatory purpose created a substantial obstacle to desegregation in northern school systems, where residential segregation . . . caused school segregation.").

[58] *Cf.* Kahlenberg, *supra* note 52, at 265–66 (describing the impact of legal theories reaching de facto segregation).

[59] Genevieve Siegel-Hawley, *Mitigating* Milliken*? School District Boundary Lines and Desegregation Policy in Four Southern Metropolitan Areas, 1990–2010*, 120 AM. J. EDUC. 391, 394–95 (2014).

[60] Erica Frankenberg, *Assessing the Status of School Desegregation Sixty Years After* Brown, 2014 MICH. ST. L. REV. 677, 681 (2014).

[61] Between *Rodriguez* and *Parents Involved*, three lesser-known Rehnquist Court decisions (known as the "resegregation trilogy") also contributed to these effects by decreasing requirements school boards needed to meet in order to be released from court orders. *See* Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 HOW. L.J. 251, 295 (2008).

[62] Frankenberg, *supra* note 60, at 681. This approach built on the rationale of the 1978 affirmative action case, Univ. of Cal. v. Bakke, 438 U.S. 265, 267 (1978), which held that explicit racial classifications in higher education admissions programs were unconstitutional. *Id.*

[63] Parents Involved in Cmty. Schs. v. Seattle School Dist. No. 1, 551 U.S. 701 (2007). When *Parents Involved* reached the Court, *Grutter v. Bollinger* also constituted important precedent on applying strict scrutiny to racial classifications in the context of education enrollment. Frankenberg, *supra* note 60, at 681.

[64] *Parents Involved*, 551 U.S. at 794–95 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505–06 (1989) ("To accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group . . . based on inherently unmeasurable claims of past wrongs.")).

students by race after past de jure segregation had already been addressed.[65] Thus, the Court's use of strict scrutiny halted efforts by local communities to end de facto segregation.[66]

These decisions, along with the Court's rolling back of desegregation orders,[67] have effectively closed the federal courthouse doors to students who are forced to attend vastly underperforming, racially segregated schools.[68] By retreating on equal educational opportunity, diluting *Brown*'s race-based education right, and removing liability from suburban districts and the North, the Court facilitated the resegregation of the country's public education system.[69] Though the Warren Court once read the Constitution "to require desegregation, [it is] now . . . read to prohibit race-conscious integration."[70]

B. *The Right to a Minimally Adequate Education*

Because the post-*Brown* cases steadily limited race-based education rights, students who seek federal relief today must pursue their rights under a different constitutional theory: the right to a minimally adequate education. Many schools alleged not to provide a minimally adequate education are segregated, both by race and by class,[71] but the constitutional arguments that support this proposed right do not implicate the de jure–de facto distinction.[72] Instead, the legal theory stems from other enumerated rights[73] and from dicta within the above race-based case opinions.[74] Through this language, the Court preserved the

[65] *See id.* at 721. This view is perhaps the most common interpretation of the Court's holding, but others believe this characterization misconstrues it. For example, the Obama administration and some education policy researchers read *San Antonio* as permitting school districts to consider race to achieve racial balance. This confusion stems from the Court's vote, which was evenly split, and Justice Kennedy's controlling concurrence, which agreed with parts of both the plurality and the dissent. *See* Rachel M. Cohen, *'Parents Involved,' a Decade Later*, AM. PROSPECT (June 28, 2017), https://prospect.org/article/%E2%80%98parents-involved%E2%80%99-decade-later [https://perma.cc/6PN3-WDNN].

[66] Kahlenberg, *supra* note 52, at 261.

[67] *See infra* Part III.

[68] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 157–64 (2d ed. 2008) (noting that "the courts were of limited relevance to the actual progress of civil rights in America").

[69] Chemerinsky, *supra* note 46, at 1609–18.

[70] Kahlenberg, *supra* note 52, at 263.

[71] Amy J. Schmitz, Note, *Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Urban Schools*, 78 MINN. L. REV. 1639, 1642–45 (1994).

[72] *See infra* Part IV. Litigants have argued for this right under a variety of legal theories, but none rely on the racial compositions of the public schools.

[73] *See* Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553, 563–73 (1992).

[74] *See* Schmitz, *supra* note 71, at 1641.

possibility that it will recognize a fundamental right to a minimally adequate education in the future.

As far back as *Brown*, the Court expressed its commitment to issues of broader state obligation and equality of educational opportunity (in addition to prohibited de jure segregation).[75] When a state chooses to provide public education, the Court proclaimed, that right "must be made available to all on equal terms."[76] Unfortunately, the Court obfuscated its views on the non-race education issues to preserve the unanimity of its decision.[77] That lack of clarity established a tenuous foundation for the right to equal education, which later cases eroded.[78]

For example, *Rodriguez* "clarified" that the *Brown* language declaring an affirmative right to equal education was not intended to be interpreted literally.[79] It announced that education is *not* a fundamental right.[80] Somewhat paradoxically, the Court also admitted that a state public education system facilitates "an absolute denial of educational opportunities to . . . its children" when it "fails to provide each child with an opportunity to acquire . . . *basic minimal skills*."[81] Moreover, the Court described education as essential to the exercise of other constitutional rights, like freedom of speech and political participation.[82] If a state were to deny students an "identifiable quantum of education" necessary to engage in American democracy, then the Court might be willing to review the state's actions under heightened scrutiny.[83] The Court likewise reserved the right to intervene in a future case if a class of students were precluded entirely from receiving an education.[84] In spite of these concessions, the Court declined to rule formally on the constitutionality of severely underperforming schools, and it has followed that paradigm ever since.[85]

[75] *See* Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954).

[76] *Id.* at 493.

[77] *See* Dennis J. Hutchinson, *Unanimity and Desegregation: Decision-Making in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 87 (1979) (finding that "the Court's continuing desire to be united outweighed its responsibility to be persuasive" on the precise meaning of the decision).

[78] *Id.*

[79] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29–36 (1973).

[80] *Id.* at 35–37.

[81] *Id.* at 37 (emphasis added).

[82] Amar, *supra* note 44.

[83] *Rodriguez*, 411 U.S. at 35–36.

[84] *See id.* at 25 n.60.

[85] Laird, *supra* note 27 ("The U.S. Supreme Court has declined opportunities to rule that access to education is a fundamental right. Sidley Austin partner Tacy Flint [said that] . . . the court did leave open, in *San Antonio Independent School District v. Rodriguez*, the question of whether it's unconstitutional to have a school system that occasioned an absolute denial of educational opportunities to any of its children." (internal quotations omitted)).

Even still, the Court expanded the *Rodriguez* concept of adequacy and echoed its reverence for democratically required educational skills about ten years later, in *Plyler v. Doe*.[86] *Plyler* was issued in response to a Texas statute that excluded undocumented noncitizen students from public schooling.[87] The plaintiffs argued that democratic institutions cannot refuse basic educational opportunity because democratic societies rely on having educated citizens.[88] The Court agreed, holding that a state may not "deny a discrete group of innocent children" the same education it offers to other children, because "a status-based denial of basic education" contradicts our constitutional framework.[89]

In light of these opinions, Justice Thurgood Marshall recognized in 1988 that the Court had "not address[ed] the question [of] whether . . . a deprivation of access [to a minimally adequate education] would violate a fundamental constitutional right."[90] In spite of the decades that have passed since, the question remains open today.[91]

III. THE COURT'S ROLE IN DESEGREGATION, RESEGREGATION, AND THE MODERN ACADEMIC ACHIEVEMENT GAP

Before *Brown*'s race-based education right eroded, the federal judiciary successfully implemented a series of remedies that curbed public school racial isolation. During this period, court-ordered desegregation efforts dismantled homogenous student enrollment demographics and facilitated significant gains in student achievement. Unfortunately, judicial intervention was only temporary, and thus the strides it achieved were also short-lived. Even still, district court judges were able to engineer a radical restructuring of the public schools throughout the 1970s and 1980s, demonstrating that the federal judiciary can effectively redress the violation of fundamental education rights.

[86] Plyler v. Doe, 457 U.S. 202, 221 (1982).

[87] *See* Jill Lepore, *Is Education a Fundamental Right?*, NEW YORKER (Sept. 3, 2018), https://www.newyorker.com/magazine/2018/09/10/is-education-a-fundamental-right [https://perma.cc/K9A7-9UQW].

[88] *Id.* (detailing the factual background for plaintiffs' argument that "[a]n educated populace is the basis of our democratic institutions" (internal quotations omitted)).

[89] *Plyler*, 457 U.S. at 222–30 (finding both a general constitutional incongruity and a violation of the Equal Protection Clause in particular).

[90] Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 466 n.1 (1988) (Marshall, J., dissenting); *see also* Papasan v. Allain, 478 U.S. 265, 285 (1986) ("[T]his court has not yet definitively settled the question [of] whether a minimally adequate education is a fundamental right . . . .").

[91] Schmitz, *supra* note 71, at 1649 n.79.

A. *The Successes of Court-Ordered Integration After* Brown

The Supreme Court prohibited de jure segregation in *Brown*, but it did not articulate how race-based educational injuries should be remedied until the following year, in *Brown II*.[92] On remand, the Court sent the cases back to the federal district courts that originally heard them, charging them to order and oversee local school district desegregation plans.[93] These changes did not begin immediately, though, because the Court initially failed to establish timetables and clear requirements for district compliance.[94] Instead, the lower courts were told to act "with all deliberate speed,"[95] an oxymoronic directive[96] that allowed school districts in the South to avoid accountability for more than another decade.[97]

After the Court intervened a second time in 1968 and insisted on immediate school district action, desegregation efforts gained substantial momentum.[98] The Court invalidated freedom-of-choice plans, no longer permitting districts to circumvent desegregation by offering parents the choice between segregated and integrated schools.[99] Just three years later, in 1971, the Court also affirmed the power of federal judges to include busing programs (which sought to achieve racial balance by overcoming de facto housing patterns) as part of their judicial

[92] Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955); Jim Chen, *With All Deliberate Speed:* Brown II *and Desegregation's Children*, 24 LAW & INEQ. 1, 2–3 (2006).

[93] ROSENBERG, *supra* note 68, at 43.

[94] James E. Pfander, Brown II*: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 47–48, 59 (2006) (noting that the original "good faith" standard under which school district efforts were evaluated led to their recalcitrance).

[95] *Brown*, 349 U.S. at 301. Widely criticized, this phrase is often cited as a primary cause for the Court's failure to secure lasting change for *Brown* litigants. *See, e.g.*, Trina Jones, Brown II: *A Case of Missed Opportunity?*, 24 LAW & INEQ. 9, 14–16 (2006) ("[T]he Warren Court sacrificed the 'right of blacks to a desegregated education in favor of a remedy more palatable to whites.'" (quoting DERRICK BELL, RACE, RACISM AND AMERICAN LAW 147 (5th ed. 2004))). The vague and gradual approach the Court adopted likely resulted from its desire to preserve unanimity and avoid racial controversy. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 313–21 (2004).

[96] Chen, *supra* note 92, at 3.

[97] *Id.* It was not until 1968 that the Court announced that "[t]he time for mere 'deliberate speed' had expired" and ordered immediate action. *Id.* (quoting Green v. Cty. Sch. Bd., 391 U.S. 430, 438 (1968)). During the ten years that followed *Brown*, nearly 99% of black children attended schools that were completely racially isolated. Gerald N. Rosenberg, *Tilting at Windmills:* Brown II *and the Hopeless Quest to Resolve Deep-Seated Social Conflict through Litigation*, 24 LAW & INEQ. 31, 34 (2006).

[98] *See* Danielle Holley-Walker, *After Unitary Status: Examining Voluntary Integration Strategies for Southern School Districts*, 88 N.C. L. REV. 877, 882–83 (2010). The Court did not outline specific goals and benchmarks for desegregation orders until nearly fifteen years after *Brown*, when it finally required local officials to ensure their districts were "unitary" and "nonracial." *Id.* (quoting *Green*, 391 U.S. at 440).

[99] KLARMAN, *supra* note 95, at 318, 341–42.

decrees.[100] The Court declared that "the scope of a district court's equitable powers to remedy past [segregation] is broad."[101]

The Court's more aggressive stance on desegregation and clearer guidelines on permissible remedies allowed for more meaningful oversight on the part of the district court judges.[102] Over time, some judicial decrees even included mandates to redraw attendance zones or to create specialized schools to foster racial diversity.[103] Stronger judicial oversight also pushed local school districts to adopt more vigorous approaches to desegregation while preserving local control.[104] As a result, between 1964 and 1988 (the peak period of desegregation progress), racial composition in the public schools changed drastically.[105] The percentage of black students in majority white schools grew from 0% to 43.5% in 1988;[106] the percentage of black students attending schools with over 90% minority enrollment fell from 78%[107] to a record low of 25%.[108]

Flowing from these changes in school demographics was a significant narrowing of the achievement gap between black and white students.[109] For example, in 1971, the academic performance gap on standardized reading tests between racial groups ranged from 35 to 53 points (depending on grade level).[110] By 1988, that margin dropped to 18 to 29 points—not just for those

[100] The Learning Network, *April 20, 1971: Supreme Court Rules that Busing Can Be Used to Integrate Schools*, N.Y. TIMES (Apr. 20, 2012), https://learning.blogs.nytimes.com/2012/04/20/april-20-1971-supreme-court-rules-that-busing-can-be-used-to-integrate-schools/ [https://perma.cc/5WDL-Q29R].

[101] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

[102] *See* ROSENBERG, *supra* note 68, at 46.

[103] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-345, BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 6 (Apr. 2016), https://www.gao.gov/assets/680/676745.pdf [https://perma.cc/DA5E-HNDB].

[104] *See id.* at 7.

[105] Chemerinsky, *supra* note 46, at 1598.

[106] Jason M. Breslow et al., *The Return of School Segregation in Eight Charts*, PBS: FRONTLINE (July 15, 2014), https://www.pbs.org/wgbh/frontline/article/the-return-of-school-segregation-in-eight-charts/ [https://perma.cc/S9YS-9JW4].

[107] Albert L. Samuels, *All But Overturned: America's Nullification of* Brown v. Board of Education, *in* CHALLENGING THE LEGACIES OF RACIAL RESENTMENT: BLACK HEALTH ACTIVISM, EDUCATIONAL JUSTICE, AND LEGISLATIVE LEADERSHIP 67, 70 (Tiffany Willoughby-Herard & Julia Jordan-Zachery eds., 2016).

[108] Nikole Hannah-Jones, *Segregation Now . . .*, ATLANTIC (May 2014), https://www.theatlantic.com/magazine/archive/2014/05/segregation-now/359813/ [https://perma.cc/47MV-5C5W?type=image].

[109] LOUIS FREEDBERG ET AL., CLOSING THE ACHIEVEMENT GAPS: WILL CALIFORNIA'S REFORMS MAKE A DIFFERENCE? 2–3 (Dec. 2015), https://edsource.org/wp-content/uploads/2015/12/CommentariesNovFinal.pdf [https://perma.cc/C6GP-PPHX] (observing that since the close of the 1980s, the achievement gap has experienced "no . . . sustained period of change").

[110] PAUL E. BARTON & RICHARD J. COLEY, THE BLACK-WHITE ACHIEVEMENT GAP: WHEN PROGRESS STOPPED 6 (2010), https://www.ets.org/Media/Research/pdf/PICBWGAP.pdf [https://perma.cc/CX3P-TUR5]; *see also* Abel McDaniels, *64 Years*

students who attended integrated districts—but *nationally*, for all students.[111] During the same period, the black-white reading level gap closed an astonishing three and a half years.[112] Court-ordered integration did not only change educational outcomes for students, either: "[I]t changed their whole lives."[113] Students who benefited from court-ordered integration were less likely to experience poverty as adults and more likely to live longer, healthier lives than their peers who remained in segregated schools.[114]

B. *Resegregation Following the Release of Court Orders*

Court-ordered desegregation plans were effective in reducing racial school segregation and in improving academic achievement, but their positive effects dissolved as quickly as they crystalized. Just six years after the federal judiciary began issuing *Brown II* remedies, the *Milliken* Court "effectively repudiated *Brown*'s integrationist mandate"[115] by refusing to endorse inter-district remedies unless each affected district was found guilty of precipitating the constitutional violation.[116] Around the same time, the *Rodriguez* case removed public school funding solutions from the menu of school district remedies for racial isolation.[117] These constraints limited local flexibility in meeting court orders.[118]

Then, in the 1980s and early 1990s, the Supreme Court further retreated from desegregation efforts by announcing that it did not intend to make the *Brown II* remedies permanent,[119] and by relaxing criteria required for release

After Brown v. Board, *Progressive Leaders Must Act on Segregation*, CTR. AM. PROGRESS (May 17, 2018), https://www.americanprogress.org/issues/education-k-12/news/2018/05/17/451027/64-years-brown-v-board-progressive-leaders-must-act-segregation/ [https://perma.cc/X2ED-4TNM] (noting that the gap between black and white students on the National Assessment of Educational Progress reading test was reduced by more than half between 1971 and 1988).

111 BARTON & COLEY, *supra* note 110, at 6–7.

112 Abigail Thernstrom, *The Racial Gap in Academic Achievement*, *in* BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 259, 262 (Abigail Thernstrom & Stephan Thernstrom eds., 2001).

113 *This American Life: The Problem We All Live With—Part One*, CHI. PUB. RADIO (Aug. 5, 2017), https://www.thisamericanlife.org/562/transcript [https://perma.cc/RK3P-YVDE] [hereinafter *The Problem We All Live With*].

114 *See id.*

115 Richard Thompson Ford, Brown*'s Ghost*, 117 HARV. L. REV. 1305, 1312 (2004).

116 Milliken v. Bradley, 418 U.S. 717, 718 (1974).

117 Chen, *supra* note 92, at 4.

118 *See id.*

119 Bd. Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 236, 248–49 (1991) (explaining that court desegregation decrees were "not intended to operate in perpetuity" and removing court supervision whenever the court deemed the district made a "good faith" effort to desegregate).

from court oversight.[120] Once a school district was able to achieve "unitary status," the courts generally relinquished it from desegregation orders.[121] Though the Court never clearly defined unitary status or its requirements, school districts were found to have achieved it when they operated a "dual school system," even when the effects of prior discrimination persisted.[122]

As a result, between 1991 and 2009, federal courts found that at least 100 districts achieved unitary status and released them from desegregation orders.[123] Once released from court supervision, school districts were free to return to neighborhood-based student assignment plans.[124] These reversions compounded deep-seated discriminatory housing patterns.[125] Combined, the rollbacks typically led to steady growth in segregation levels for the first ten years following release, which later settled at levels substantially higher than those that were attained under court order.[126] When multiplied by the number of districts released from court orders, these trends led to the resegregation of American schools.[127]

Today, following release from court orders, the percentage of black students who attend integrated schools has been cut in half;[128] the percentage of black students who attend schools with 90% minority enrollment (or higher) has more than doubled;[129] and the occurrence of "apartheid schools" (schools where the white student population is 1% or less) has ballooned in number from 2762 to

[120] Sean F. Reardon et al., Brown *Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876, 877–78 (2012). Along with *Dowell*, two additional key cases facilitated this relaxation: Freeman v. Pitts, 503 U.S. 467, 471 (1992) (allowing districts that made incremental progress towards desegregation to be released from court orders gradually), and Missouri v. Jenkins, 515 U.S. 70, 100–02 (1995) (releasing school districts from decree after they restored victims to the position they would have occupied had the discriminatory state action not occurred). *Id.*

[121] *See* John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 668 (2001).

[122] Kevin D. Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1107 n.7 (1990).

[123] *See* Holley-Walker, *supra* note 98, at 887–90. The federal government played an active role in increasing the rate at which unitary status was granted at the direction of President George W. Bush. *Id.*

[124] Reardon et al., *supra* note 120, at 879.

[125] *See, e.g.*, Emily Badger, *How Redlining's Racist Effects Lasted for Decades*, N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasted-for-decades.html [https://perma.cc/269S-WMB6].

[126] Reardon et al., *supra* note 120, at 899.

[127] *See* Chemerinsky, *supra* note 46, at 1620–22.

[128] *See* Alvin Chang, *The Data Proves that School Segregation is Getting Worse*, VOX (Mar. 5, 2018), https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data [https://perma.cc/5C4Q-JEDC].

[129] *See, e.g.*, *infra* Appendices A–D (showing that many schools in districts across the United States are comprised of more than 95% minority students); *see also* Hannah-Jones, *supra* note 108.

6727.[130] Segregation rates in public schools today are closer than ever to pre-*Brown* rates, and the federal judiciary's poor implementation of desegregation orders helped foster this unjust modern landscape.[131] By eroding race-based education rights and eliminating district accountability after the achievement of unitary status, the Court abandoned the promise it made in *Brown* after only twenty years of effort: "We somehow want this to have been easy and we gave up really fast. . . . [T]here was really [just] one generation of school desegregation."[132]

C. *The American Public School Landscape Today*

In addition to fostering the return of racial segregation to our public schools, the release of court orders also accelerated socioeconomic segregation and hindered progress towards equal educational opportunity.[133] School-based racial isolation has coincided with economic isolation since the early 1990s, a problem that is especially pronounced in cities with the most poor students.[134] Today, nearly 75% of black students and 67% of Latino students attend schools where the majority of kids qualify as low-income.[135] At least 33% of American schools are comprised entirely of poor black and Latino students,[136] and non-integrated schools often have the highest concentrations of impoverished

[130] Hannah-Jones, *supra* note 108.

[131] Editorial, *School Districts Fight Segregation on Their Own*, N.Y. TIMES (June 26, 2017), https://www.nytimes.com/2017/06/26/opinion/school-segregation-dallas.html?mcubz=0 [https://perma.cc/76FC-2CSN].

[132] *The Problem We All Live With*, *supra* note 113.

[133] As the courts released desegregation decrees, the students reassigned to less integrated schools suffered academically. *See generally* Stephen B. Billings et al., *School Segregation, Educational Attainment, and Crime: Evidence from the End of Busing in Charlotte-Mecklenburg*, 129 Q.J. ECON. 435 (2014) (demonstrating a sharp decline in students' standardized test performance and graduation rates after the local school district was released from court order).

[134] Rothstein, *supra* note 51. For example, in Detroit today, the typical black student attends a school where just 3% of the students are white and 84% of students are low-income. *Id.*

[135] Ronald Brownstein & Nat'l J., *How* Brown v. Board of Education *Changed—and Didn't Change—American Education*, ATLANTIC (Apr. 25, 2014), https://www.theatlantic.com/education/archive/2014/04/two-milestones-in-education/361222/ [https://perma.cc/NH9Z-THWX].

[136] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 103, at 58–60. Another 33% of American schools are comprised entirely of white affluent students. *Id.*

kids.[137] Thus, segregation in American public schools today is not only a problem of race but also one of poverty.[138]

Kids who grow up poor face challenges that their more advantaged peers do not, such as greater educational needs[139] and burdensome stress that results from family and neighborhood hardships.[140] When students who face these additional barriers are concentrated in classrooms and schools, they do not benefit from interacting and growing with kids who are less burdened and who can help boost their performance.[141] On top of these impediments, schools with high populations of poor students offer far fewer educational opportunities than do their more prosperous institutional counterparts. High-poverty schools employ the least qualified and least experienced teachers[142] and withstand the highest rates of teacher absenteeism[143] and teacher turnover.[144] Students in these schools have limited access to gifted and talented education programs, high-level math and science courses, and Advanced Placement courses.[145] They learn in the lowest-quality educational facilities,[146] which offer significantly fewer

[137] *See, e.g.*, *infra* Appendix A (showing that thirty Baltimore public schools enroll more than 95% minority students and 100% low-income students); Appendix D (indicating that eleven Oakland Unified schools have student populations that are more than 90% minority and low-income); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 103, at 10 (emphasizing the growth in volume of schools isolated by both poverty and race).

[138] Richard V. Reeves & Edward Rodrigue, *Convenience Plus a Conscience: Lessons for School Integration*, BROOKINGS INST. (Mar. 24, 2017), https://www.brookings.edu/research/convenience-plus-a-conscience-lessons-for-school-integration [https://perma.cc/T5V7-JCR3].

[139] *See* Roey Ahram et al., *Framing Urban School Challenges: The Problems to Examine When Implementing Response to Intervention*, RTI ACTION NETWORK, http://www.rtinetwork.org/learn/diversity/urban-school-challenges [https://perma.cc/YJ9Y-N4MZ].

[140] *See* Sheila Ohlsson Walker & Melissa Steel King, Opinion, *'Toxic Stress' in the Classroom: How a Public Health Approach Could Help*, WASH. POST (June 6, 2016), https://www.washingtonpost.com/news/education/wp/2016/06/06/toxic-stress-in-the-classroom-how-a-public-health-approach-could-help/?utm_term=.9dbde0eb7c90 [https://perma.cc/2MWT-GNFD].

[141] *The Problem We All Live With*, *supra* note 113.

[142] *See generally* Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RESOURCES 326 (2002) (explaining the reasons that teachers in disadvantaged schools are usually less experienced and less credentialed than teachers in more affluent schools).

[143] *See* U.S. DEP'T EDUC., 2013–14 CIVIL RIGHTS DATA COLLECTION: KEY DATA HIGHLIGHTS ON EQUITY AND OPPORTUNITY GAPS IN OUR NATION'S PUBLIC SCHOOLS 9 (Oct. 2016).

[144] Hannah-Jones, *supra* note 108.

[145] U.S. DEP'T EDUC., *supra* note 143, at 6–7.

[146] *See* Powell, *supra* note 121, at 682.

school resources.[147] When these factors combine, "it is almost impossible to undo [the resulting] harm."[148]

Disparities in high-poverty schools lead to abysmal educational outcomes for the students who attend them.[149] Today's achievement gap is at a four-decade low, and this gap is most pronounced between socioeconomic groups.[150] Since poor students do not benefit from the same educational opportunities, they do not attain the same academic benefits.[151] More than 30% score at the lowest possible percentiles on national reading and math tests,[152] and more than half will never graduate.[153] Many American students who attend socioeconomically segregated schools are therefore denied access to a minimally adequate education.

IV. *GARY B.* AND THE RIGHT TO ACCESS LITERACY EDUCATION

Other litigants have attempted to identify a winning argument to support the right to a minimally adequate education, but none has been successful yet. Over the past several decades, they have rooted these arguments in a variety of

[147] *See* Chris Duncombe, *Unequal Opportunities: Fewer Resources, Worse Outcomes for Students in Schools with Concentrated Poverty*, COMMONWEALTH INST. (Oct. 26, 2017), https://www.thecommonwealthinstitute.org/2017/10/26/unequal-opportunities-fewer-resources-worse-outcomes-for-students-in-schools-with-concentrated-poverty/ [https://perma.cc/MRW6-AUGJ].

[148] *The Problem We All Live With*, *supra* note 113 ("[I]t's important to point out that it is not that something magical happens when black kids sit in a classroom next to white kids. . . . What integration does is it gets black kids in the same facilities as white kids, and therefore it gets them access to the same things that [the white] kids get—quality teachers and quality instruction."); *see also* Michael Hansen, *In Search of the Key to Closing Achievement Gaps*, BROOKINGS INST. (Jan. 18, 2016), https://www.brookings.edu/blog/brown-center-chalkboard/2016/01/18/in-search-of-the-key-to-closing-achievement-gaps/ [https://perma.cc/3QA6-YH9S] (arguing that improved student achievement results from integrated schools for a myriad of reasons, including better access to effective teaching, peer effects, and socio-emotional benefits).

[149] *See infra* Appendices A–D.

[150] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 103, at 9.

[151] News Editor, Brown *at 60 and* Milliken *at 40*, HARV. ED. MAG. (2014), https://www.gse.harvard.edu/news/ed/14/06/brown-60-milliken-40 [https://perma.cc/AA6J-GCZV] (quoting James Ryan, Dean, Harvard Graduate School of Education) ("The higher percentage of minorities in an urban school, on average, the higher the percentage of poor students. And students who attend high-poverty schools generally score lower on standardized tests, are less likely to graduate, and are less likely to go to college.").

[152] BARTON & COLEY, *supra* note 110, at 39–40.

[153] Joseph S. Renzulli, *The Achievement Gap, the Education Conspiracy Against Low Income Children, and How This Conspiracy Has Dragged Down the Achievement of* All *Students*, NAT'L SOC'Y FOR GIFTED & TALENTED 1 (2008), https://www.nsgt.org/wp-content/uploads/2013/01/article_conspiracytheorypaper_renzulli.pdf [https://perma.cc/7M8S-PTQE].

constitutional provisions, including the Due Process Clause,[154] the Privileges and Immunities Clause,[155] the Free Speech Clause,[156] the Citizenship Clause,[157] and even the Takings Clause.[158] The *Gary B.* case presents an ambitious variation on the right to a minimally adequate education—the right to access a minimal literacy education.[159] Building on dicta from *Rodriguez*,[160] it contends that other constitutional rights, including the rights of expression and political participation, all necessitate an ability to read.[161] This unique argument has prompted many legal scholars to predict the case will ultimately be heard by the Supreme Court, even though it faces an arduous path to achieving its intended goal.[162]

Following the dismissal of the original complaint, the students filed an appeal with the Sixth Circuit.[163] In that brief, the legal team expanded the constitutional justifications for recognizing this unenumerated right, both in terms of Equal Protection and Due Process.[164] Both theories propose that the court should employ heightened judicial scrutiny to review the adequacy of the education these Detroit schools offer, arguing that actions by state and local education officials should not be given standard "rational basis" deference.[165]

A. *Equal Protection Theory*

First, the students argue that they are part of a disempowered group of discrete racial and socioeconomic identities because they are all "low-income children of color."[166] They assert that Michigan state education officials have violated their equal protection rights by functionally excluding them from the state's education system.[167] Because it would be difficult to prove that the government has engaged in intentional racial favoritism in violation of the

[154] *See* Note, *A Right to Learn? Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1324 (2007).

[155] *See* Bitensky, *supra* note 73, at 553.

[156] *Id.*

[157] Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–35 (2006).

[158] Denise C. Morgan, *What Is Left to Argue in Desegregation Law? The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 100 (1991).

[159] *See* Complaint, *supra* note 3, at 30–39.

[160] *See supra* Part II.B.

[161] *See* Complaint, *supra* note 3, at 30–39.

[162] *See* Stephen Sawchuk, *Right-to-Read Advocates Undeterred by Court Setback*, EDUC. WK. (July 17, 2018), https://www.edweek.org/ew/articles/2018/07/18/right-to-read-advocates-undeterred-by-court-setback.html [https://perma.cc/5ZP4-CDK9]; *see also* Amar, *supra* note 44.

[163] *See* Brief of Appellants, Gary B. v. Snyder, No. 18-1855/18-1871 (6th Cir. Nov. 16, 2018).

[164] *Id.* at 20–23.

[165] *Id.* at 51–54.

[166] *See* Complaint, *supra* note 3, at 1.

[167] *Id.* at 125.

Constitution,[168] the *Gary B.* argument focuses on how the students' denied access to literacy education has impacted their other constitutional rights, like the right to vote.[169] The Court has a history of inferring "impermissible intent from unequal racial effects [in] the political rights realm,"[170] and the students hope the judges will be less willing to defer to state educational decision-making on similar grounds.[171]

B. *Due Process Theory*

Setting aside racial and socioeconomic composition, the students also contend that the Fourteenth Amendment secures a "fundamental right to access to literacy" (including access to minimum levels of quality in school facilities, instructional materials, and teachers) under substantive due process doctrine.[172] They argue that because the state compels students to attend school and therefore restrains their individual liberties, the state assumes an obligation to provide them with access to literacy education.[173] Every state mandates compulsory education and requires minors to attend school,[174] so all students participating in the public education system inherit the right to a minimally adequate education.[175] This path-breaking argument defines educational adequacy as a negative right rather than an affirmative one, which also increases its likelihood of success.[176]

[168] Amar, *supra* note 44; *see also supra* note 53 and accompanying text.

[169] *See* Complaint, *supra* note 3, at 30–39.

[170] Amar, *supra* note 44.

[171] *Id.*

[172] *See* Brief of Appellants, *supra* note 163, at 24–26.

[173] *Id.* at 36–40.

[174] Louisa Diffey & Sarah Steffes, *50-State Review: Age Requirements for Free and Compulsory Education*, EDUC. COMM'N STS. 1, 4–8 (2017), https://www.ecs.org/wp-content/uploads/Age_Requirements_for_Free_and_Compulsory_Education-1.pdf [https://perma.cc/V66K-73RF].

[175] *See* Wong, *supra* note 39.

[176] The federal Constitution recognizes few affirmative individual rights and imposes few positive obligations on the government. Instead, it largely secures individual freedoms by defining negative liberties and by prohibiting the government from acting in specific ways. *See, e.g.*, Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 333 (2011) (contrasting the guarantees of the U.S. Constitution with many state constitutions, which do provide for positive rights and impose affirmative obligations on the government). *But see* Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 110 (2013) (arguing that the Constitution should be read to guarantee affirmative rights, especially with respect to the right to education). At one time, the Court embraced an expansion of positive constitutional guarantees, but the current, increasingly conservative Court will resist strongly a recognition of new affirmative individual rights. *See* Matt Samberg, *The Fundamentals of Fundamental Rights*, MEDIUM (July 10, 2018), https://medium.com/@mattsamberg/the-fundamentals-of-fundamental-rights-1138ced2ad4 [https://perma.cc/2DPM-SW7C].

However, in its present form, the criteria for satisfying or violating access to literacy education are not crisply defined. The *Gary B.* complaint asserts that students attend schools whose proficiency rates "hover near zero," but their rates of lowest-level literacy proficiency range from 1.8% to 12.5%.[177] Without providing a clearer definition or establishing a test for weighing school performance metrics and other indicators, the Justices are likely to worry about a slippery slope to claims purporting that students have the right to *equal* education (which the Court has already expressly rejected).[178] As a result, this Note recommends that that future appellate arguments outline precise standards that define the scope of this right.[179]

V. A PROPOSED REMEDY: COURT-ORDERED SOCIOECONOMIC INTEGRATION PROGRAMS

In addition to its scope, the *Gary B.* case faces another significant legal hurdle: "[T]he practical and logistical concerns about appropriate remedies that might disincline federal courts to get deeply involved in decisions about school facilities, curricula, teacher training, and the like."[180]

Recently, at oral arguments in front of the Sixth Circuit, Judge Eric L. Clay articulated these concerns:

> You want a decent school system set up and funded and . . . but your complaint allegations, maybe understandably, [do not] make clear how you would like the Court to assist in accomplishing that by [issuing] an injunctive order. . . . [I]f we need to devise a remedy that involves expenditure of funds, there's the issue of legally, where could that money come from; whether we could even order an allocation of such money. Your complaint does not say anything about the practicalities of funding the kind of school system with the resources that would be needed to ameliorate the problems that you've

[177] *See* Complaint, *supra* note 3, at 4–7 (emphasis omitted). This range drastically impacts the number of schools implicated. In its current form, it is also unclear whether the right applies to students based on their current course enrollment and the corresponding proficiency rates of those classes; or whether it applies to all the students attending a school whose average proficiency rates fall below a particular threshold. These distinctions must be clarified for the Court to seriously consider recognizing this right.

[178] Chemerinsky, *supra* note 46, at 1618 ("[T]he Constitution requires equal opportunity and not equal result . . . .").

[179] This Note advocates for a narrower, school-based definition of access to literacy education as a tentative judgment (one that sits uneasily but seems necessary in light of these tensions). Appendices A–D offer one possible definition: schools that achieve only 5% (or less) proficiency in literacy education, as determined by standardized state testing on English Language Arts standards. Using this definition, there are nearly 36,000 students across just four U.S. public school districts who currently attend unconstitutional schools. For more information about how this right could be defined differently, see Appendix A n.290 and Appendix B n.296.

[180] Amar, *supra* note 44 ("Most of the other settings in which the Court has recognized a fundamental right do not involve the remedial complexity the [*Gary B.*] case implicates.").

> identified. What do you want us to do in that regard? What kind of injunctive remedy? And where would we get the resources if we agree with you that there is . . . a federal constitutional right to literacy?[181]

This Note argues that there is indeed a remedy that both addresses Judge Clay's concerns about funding and allows the Court to avoid wading into the minutia of school management, while providing the relief that students deserve. Recalling its past success in ordering desegregation decrees to effectuate the *Brown* race-based education right in the 1970s and '80s,[182] courts can similarly order decrees that require local school districts to implement socioeconomic integration programs today. These programs are a proven mechanism for closing schools that deny access to literacy education while simultaneously replacing them with higher-quality alternatives.

A. *Why the Federal Judiciary Should Order Socioeconomic Integration*

Traditional school-based measures have not been effective in addressing chronic school underperformance, despite decades of effort. As an alternative to these reforms, districts have increasingly turned to socioeconomic integration programs to ameliorate the achievement gap. Data show that such programs are able to cut by significant margins the gap in proficiency levels between poor students and their more advantaged peers while also addressing the race-based gap.[183] However, voluntary programs face significant practical, political, and legal challenges that threaten their long-term success—even when they are promoted by executive agencies or codified by legislatures. These programs therefore need protection from the judicial branch.

1. *School-Based Reforms Have Not Closed the Achievement Gap*

For decades, the education field has advanced various strategies to alleviate inequities within the American public school system, but none has proved to be effective on a national scale.[184] Education leaders commonly focus on initiatives such as mandating more rigorous academic standards and aligned curriculum, raising standards for teacher quality,[185] promoting early childhood

[181] Oral Argument at 12:44–15:30, Gary B. v. Snyder, No. 18-1855/18-1871 (6th Cir. Oct. 24, 2019), https://www.ca6.uscourts.gov/audio-files-completed-arguments (click "Search for Oral Arguments"; then enter case number) [https://perma.cc/TP2T-X3UH].

[182] *See* ROSENBERG, *supra* note 68, at 46.

[183] *The Problem We All Live With*, *supra* note 113.

[184] *See* Andy Porter, *Rethinking the Achievement Gap*, PENN GRADUATE SCH. EDUC.: NEWSROOM, https://www.gse.upenn.edu/news/rethinking-achievement-gap [https://perma.cc/2TAE-JSTG].

[185] *See, e.g.*, Amanda Ripley, *Higher Calling*, SLATE (June 17, 2014), https://slate.com/human-interest/2014/06/american-schools-need-better-teachers-so-lets-make-it-harder-to-become-one.html [https://perma.cc/R6MC-PGRL] ("33 states

intervention,[186] advancing early college programs, and increasing accountability through additional standardized testing.[187] Some states have even used the legislature to induce government takeover of individual schools[188] and entire school districts to address severe underperformance.[189]

Of all these measures, though, none has successfully eliminated—or even substantially narrowed—the achievement gap over time.[190] Because these solutions do not address the underlying issue of concentrated poverty (or the myriad related challenges that high-poverty schools face), they are too narrow.[191] But research demonstrates that one solution *can* successfully address

have passed meaningful new oversight laws or regulations to elevate teacher education in ways that are much harder for universities to game or ignore.").

[186] *See, e.g.*, Paul Reville, *Why We Fail to Address the Achievement Gap*, EDUC. WK. (July 7, 2015), https://www.edweek.org/ew/articles/2015/07/08/why-we-fail-to-address-the-achievement.html [https://perma.cc/WD4K-8XQS] (highlighting the shortcomings of educational solutions that only address early childhood education or that seek to offer high-performing charter schools for only limited grades)."Would any of us with privilege think of providing an intensive, comprehensive education and care program for our children for two years, then neglect them for 10 years, and eventually expect them to be just fine at the end of the dozen-year period?" *Id.*

[187] *See generally* Julian Vasquez Heilig et al., *Examining the Myth of Accountability, High-Stakes Testing, and the Achievement* Gap, 18 J. FAM. STRENGTHS (2018) (suggesting that standardized testing and its corollary focus on reading, writing, and math instruction have not been effective because they result in sacrificing other non-testable learning opportunities that teach important critical thinking skills).

[188] *See* LEARNING POINT ASSOCS., SCHOOL RESTRUCTURING OPTIONS UNDER NO CHILD LEFT BEHIND: WHAT WORKS WHEN? STATE TAKEOVERS OF INDIVIDUAL SCHOOLS 7–11 (2005), https://files.eric.ed.gov/fulltext/ED489527.pdf [https://perma.cc/U82C-EBVP].

[189] *See, e.g.*, DOMINGO MOREL, TAKEOVER; RACE, EDUCATION, AND AMERICAN DEMOCRACY 19–45 (2018) (describing unsuccessful state takeovers in Newark, New Jersey and Central Falls, Rhode Island); Curt Guyette, *After Six Years and Four State-Appointed Managers, Detroit Public Schools' Debt Has Grown Even Deeper*, DET. METRO TIMES (Feb. 25, 2015), https://www.metrotimes.com/detroit/after-six-years-and-four-state-appointed-managers-detroit-public-schools-debt-is-deeper-than-ever/Content?oid=2302010 [https://perma.cc/2AYK-235M] (demonstrating the failed history of state takeover in Detroit).

[190] DAVID N. PLANK ET AL., STATE LEVEL STRATEGIES AND POLICIES FOR CLOSING THE ACHIEVEMENT GAP 1 (2008), https://education.ucdavis.edu/sites/main/files/Plank_Policy_Brief_WEB_0.pdf [https://perma.cc/SZL2-XS62] (emphasizing that in spite of these efforts, "[n]o state has had a consistent record of narrowing the gap, in all its aspects, over a significant period of time"); *see also* FREEDBERG ET AL., *supra* note 109, at 1 (asserting that poor California test results "underscored the continuing achievement gaps that decades of education reforms have failed to close").

[191] *See generally* Emma García & Elaine Weiss, *Reducing and Averting Achievement Gaps*, ECON. POL'Y INST. (Sept. 27, 2017), https://www.epi.org/publication/reducing-and-averting-achievement-gaps/ [https://perma.cc/22HJ-T9ZT] (describing failed educational reforms and calling for comprehensive interventions targeting poverty to tackle the achievement gap).

high-poverty schools and the disparate academic results they produce: socioeconomic school integration.[192]

2. *Socioeconomic Integration Ameliorates Underperforming Schools*

Today, the socioeconomic status (SES)[193] of a school is the factor most determinative of a student's academic success.[194] Recent social science research confirms that "a school's socioeconomic status ha[s] as much impact on the achievement growth of high school students as a student's individual economic status."[195] Schools that serve large numbers of low-SES students lack adequate resources, which compounds other obstacles that children from low-SES homes face, such as delayed cognitive development and underdeveloped language and memory skills.[196] Correspondingly, by the ninth grade, poor students are five years behind in terms of literacy skill development,[197] and they are four times likelier to drop out of high school.[198]

Moreover, income-based segregation between neighborhoods has increased over the past three decades.[199] For example, the reading achievement gap

[192] *The Problem We All Live With*, *supra* note 113 ("[W]e have this thing that we know works, that the data shows works, that we know is best for kids. And we will not talk about it. . . . [I]t's not even on the table.").

[193] According to the American Psychological Association, socioeconomic status includes "not just income but also educational attainment, financial security, and subjective perceptions of social status and social class." *Education and Socioeconomic Status*, AM. PSYCHOL. ASS'N, https://www.apa.org/pi/ses/resources/publications/education.aspx [https://perma.cc/27AL-VPJQ].

[194] The renowned "Coleman Report" concluded in the 1960s that all children do better in middle class schools than they do in high-poverty schools. *See* JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 21–22, 325 (1966).

[195] Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1548–49 (2007) (citing Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 TCHRS. C. REC. 1999, 2014 (2005)).

[196] *See Education and Socioeconomic Status*, *supra* note 193.

[197] Sean Reardon et al., *Patterns of Literacy Among U.S. Students*, 22 FUTURE CHILD. 17, 17 (2012), https://futureofchildren.princeton.edu/sites/futureofchildren/files/media/literacy_challenges_for_the_twenty-first_century_22_02_fulljournal.pdf [https://perma.cc/H8QS-BBUP] ("Black and Hispanic students enter high school with average literacy skills three years behind those of white and Asian students; students from low-income families enter high school with average literacy skills five years behind those of high-income students. These are gaps that no amount of remedial instruction in high school is likely to eliminate. And while the racial and ethnic disparities are smaller than they were forty to fifty years ago, socioeconomic disparities in literacy skills are growing.").

[198] *Table 110*, NAT'L CTR. FOR EDUC. STATS., http://nces.ed.gov/programs/digest/d08/tables/dt08_110.asp [https://perma.cc/ND87-JKU7].

[199] Ann Owens, *Inequality in Children's Contexts: Income Segregation of Households With and Without Children*, AM. SOC. REV. 549, 549 (2016); *see also* Richard D. Kahlenberg, Opinion, *To Really Integrate Schools, Focus on Wealth, Not Race*, WASH. POST. (June 7,

between students from low-SES and high-SES neighborhoods has increased by 40% over the past twenty-five years.[200] Due to the sharp rise in income inequality, socioeconomic disparities are now as pronounced as racial disparities.[201] Even still, black kids are ten times likelier to live in poor neighborhoods than are their white peers.[202]

Targeting socioeconomic status through school integration breaks up concentrations of both poor and minority school populations.[203] In fact, some districts pursue socioeconomic integration "because they value racial diversity and know that using socioeconomic status will produce a racial dividend in a race-neutral way."[204] According to the Urban Institute, integrating students by class results in more than 55% racial integration when the solution is intra-district, and nearly 80% racial integration when the solution is inter-district.[205] Almost 90% of high-minority schools are also high-poverty schools, and socioeconomic integration could impact the 2.5 million students who attend them.[206]

Socioeconomic integration also reduces disparities in academic achievement.[207] Because academic outcomes are most heavily influenced by students' collective socioeconomic statuses, improving schools' SES diversity impacts the achievement gap more directly.[208] Dispersing high concentrations

2016), https://www.washingtonpost.com/news/in-theory/wp/2016/06/07/to-really-integrate-schools-focus-on-wealth-not-race/?utm_term=.3b988eb41ee8 [https://perma.cc/EDM3-B9QY] (reviewing the Court's role in fostering this disparate landscape).

[200] Sean F. Reardon, *The Widening Income Achievement Gap*, 70 EDUC. LEADERSHIP 10, 11 (2013).

[201] *Id.*

[202] PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY 27 (2013).

[203] *See* Kahlenberg, *supra* note 195, at 1551–54.

[204] *Id.* at 1554.

[205] *Id.* at 1556.

[206] *Id.* at 1551, 1556.

[207] Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Equity*, 2005 C.R. PROJECT 1, 14–21.

[208] *Id.*

of impoverished students also fosters improved long-term social[209] and economic[210] outcomes.

3. *Voluntary Integration Programs Face Practical Limitations*

Recognizing that integrated schools foster better academic results, some educational leaders have voluntarily adopted socioeconomic integration programs.[211] They facilitate these programs most commonly by redrawing attendance zones, implementing district-wide choice policies, offering magnet and charter schools, and designing transfer policies.[212] These programs are on the rise; a recent study shows that class-based integration programs more than doubled between 2007 and 2016.[213] But even with this significant increase, only 8% of public school students attend a district that currently attempts to integrate based on socioeconomic class.[214] Moreover, voluntary integration programs are usually confined to district boundaries; districts with high levels of poverty or racial homogeneity are therefore unable to meaningfully address enrollment demographics within each school.[215]

Education leaders also struggle with voluntary integration program implementation due to funding and recruitment challenges.[216] Agency-based grant funding typically lasts only as long as the initiating administration, and school districts fumble to plan long-term programs without more permanent funding streams.[217] Legislative fiscal mechanisms generally condition financial

[209] *See* John B. King, Jr., Delegated Deputy Sec'y, U.S. Dep't of Educ., Address at the National Coalition on School Diversity Conference: School Integration Policy Plenary Panel (Oct. 8, 2015), https://www.youtube.com/watch?v=Lb63pgatW5c&feature=youtu.be [https://perma.cc/F5HK-GYER] ("Schools that are integrated are better at preparing students to work with diverse peers [and at] challenging students to think about how we ensure a diverse society that honors our commitment to equality of opportunity."); *see also* Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 599 (2011) (arguing that integrated schools help combat bias, enabling children to navigate the multicultural marketplace more successfully); Rachel Martin & Cara McClellan, *Connecticut's Effort to Integrate Hartford Schools Is Working*, HILL (July 17, 2018), http://thehill.com/opinion/education/397201-connecticuts-effort-to-integrate-hartford-schools-is-working [https://perma.cc/VPM8-UQ4J].

[210] *See* Martin & McClellan, *supra* note 209.

[211] *See* Holley-Walker, *supra* note 98, at 898–901.

[212] *Id.* at 899–901.

[213] Halley Potter et al., *A New Wave of School Integration: Districts and Charters Pursuing Socioeconomic Diversity*, CENTURY FOUND. (Feb. 9, 2016), https://tcf.org/content/report/a-new-wave-of-school-integration/?session=1 [on file with *Ohio State Law Journal*].

[214] *Id.*

[215] Holley-Walker, *supra* note 98, at 905–06.

[216] *See, e.g.*, Cohen, *supra* note 65 (describing the challenges that result from temporary grant programs and political uncertainty).

[217] *See, e.g.*, Richard D. Kahlenberg, *The New Champions of School Integration*, ATLANTIC (Apr. 6, 2017), https://www.theatlantic.com/education/archive/2017/04/the-

support on suburban student participation, which creates external limits on program enrollment.[218] Relatedly, recruiting students to opt-in to voluntary integration programs often falls on the shoulders of under-resourced staff who are tasked with family outreach across multiple school districts.[219] These challenges threaten the continued viability of such voluntary programs. Because voluntary integration programs are not subject to formal authoritative oversight and depend on tenuous, temporary support, student rights would be better protected if the judiciary effectuated them.

4. *Socioeconomic Integration Overcomes Court Scrutiny and Political Hesitation*

Voluntary integration programs that employ racial classifications face both legal challenges and political resistance. For example, a group of Connecticut parents recently filed a federal lawsuit against their local school district, which voluntarily operates an inter-district integration program.[220] The parents allege that the program's enrollment requirements impose an impermissible race-based quota in violation of the Equal Protection Clause of the Fourteenth Amendment.[221] The legal challenge hinges on whether the Court revisits its

new-champions-of-school-integration/522141/ [https://perma.cc/CS22-U794]. The Obama administration created a grant-based program, "Opening Doors, Expanding Opportunities" to try to foster integration, and over twenty-five school districts expressed interest in participating. The U.S. Department of Education rescinded that program, however, after President Trump took office. *Id.*

[218] For example, the funding mechanisms underlying legislatively created inter-district programs usually condition the budget on the number of suburban students who choose to enroll. As a result, the number of students who want the opportunity to attend school outside their residential district often surpasses the number of lottery slots that afford such an opportunity. When magnet schools are unable to meet these requirements, seats remain empty to preserve state funding, despite the large numbers of district students who are eager for the chance to participate. *See Progress in Hartford Schools, But Illegal Segregation Persists*, HARTFORD COURANT (Mar. 19, 2017), https://www.courant.com/opinion/editorials/hc-ed-hartford-schools-only-halfway-to-integration-20170318-story.html [https://perma.cc/V49Q-M8GU]; *see also* Jane R. Price & Janet R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL'Y REV. 291, 292 (1987) (highlighting that voluntary programs benefit only a limited group of children, at the expense of others).

[219] *See The Problem We All Live With*, *supra* note 113.

[220] *See* Mark Keierleber, *New Federal Lawsuit Takes on Hartford's 30-Year School Desegregation Effort—and Challenges the Value of Integration Itself*, 74 (Oct. 31, 2018), https://www.the74million.org/article/new-federal-lawsuit-takes-on-hartfords-30-year-school-desegregation-effort-and-challenges-the-value-of-integration-itself/ [https://perma.cc/LZH4-ZVP6]; *see also* Complaint at 2, Robinson v. Wentzell, No. 3:18-cv-00274 (D. Conn. Feb. 15, 2018) (alleging that the school district's "most needy students suffer under an education bureaucracy that is more concerned with the color of a child's skin than her academic future").

[221] Complaint, *supra* note 220, at 19; *see also* Erika Frankenberg et al., *School Integration Efforts After* Parents Involved, 37 HUM. RTS. 10, 13 (2010) (arguing for the

affirmative action jurisprudence, and on how the Court applies strict scrutiny to the race-based elements of the program.[222] At best, the future of the program is extremely uncertain.[223]

Differentiation based on socioeconomic status, on the other hand, offers a "legally promising strategy"[224] because it evokes a less demanding form of judicial review—the rational basis test—and therefore does not pose the same legal hurdles.[225] Additionally, socioeconomic integration carries less political riskiness, both for the judges who issue court orders and the local decisionmakers who create the programs in accordance with judicial decree.[226] In the past, these actors have been hesitant to take meaningful steps towards remedying "racial isolation of neighborhoods, or the school segregation that flows from it" because the issue is so politically charged.[227] Class-based integration allows judges and local officials to engage in a solution without assuming that risk.

5. *State Courts Have Not Redressed State Education Claims*

Since the Supreme Court has not yet recognized a federal constitutional right to a minimally adequate education, student plaintiffs most commonly pursue relief in state court.[228] State-level claims are based on violations of education rights that are secured under state constitutions,[229] and they typically

necessity of federal guidance and outlining what is allowable for districts interested in utilizing voluntary desegregation programs).

[222] *A Lawsuit in Hartford, Connecticut Seeks to Undermine the State's Landmark Desegregation Case*, HARV. C.R. C.L. L. REV. (Oct. 24, 2018), https://harvardcrcl.org/a-lawsuit-in-hartford-connecticut-seeks-to-undermine-states-landmark-desegregation-case/ [https://perma.cc/8TZE-KCZE].

[223] *See* Rachel M. Cohen, *A Lawsuit Threatens a Groundbreaking School-Desegregation Case*, NATION (Feb. 11, 2019), https://www.thenation.com/article/connecticut-segregation-schools-sheff/ [https://perma.cc/AJ5R-C9DX] (discussing a federal lawsuit that challenges the integrated system and alleges rampant unconstitutional discrimination).

[224] *See* Marco Basile, *The Cost-Effectiveness of Socioeconomic School Integration*, *in* THE FUTURE OF SCHOOL INTEGRATION: SOCIOECONOMIC DIVERSITY AS AN EDUCATION REFORM STRATEGY 127, 129 (2010).

[225] Kahlenberg, *supra* note 195, at 1555 ("Even opponents of using race in student assignment concede that using socioeconomic status is perfectly legal.").

[226] *See* Rothstein, *supra* note 51.

[227] *Id.*

[228] *See* Dana Goldstein, *How Do You Get Better Schools? Take the State to Court, More Advocates Say*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/us/school-segregation-funding-lawsuits.html [https://perma.cc/K6UB-76V3].

[229] *Id.* Most state constitutions guarantee the right to an adequate education. *See* RANDY J. HOLLAND ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 598 (2d ed. 2010) (highlighting unique state constitution educational provisions that have no federal constitutional equivalent).

target the adequacy of the state educational system.[230] In response to this litigation, the state courts have issued clearer definitions of educational adequacy than have the federal judiciary or state legislatures.[231] Indeed, state courts have found that many school districts serving primarily minority and poor students fall below state constitutional requirements, and these decisions have yielded some initial plaintiff success in state-level educational adequacy cases.[232]

But most of these victories have been only temporary.[233] Where the state courts were favorable to student plaintiffs in the 1990s, that trend has all but disappeared.[234] Today, even when state judges recognize that schools and districts foster unconstitutional deprivations and disparities, those same judges eschew their responsibility to issue a responsive remedy.[235] Political and economic pressures have caused these state judges to balk and instead engage in "remedial abstention."[236] As a result, state court judges have largely downgraded the right to education and have functionally removed the issue from justiciability altogether.[237]

State courts have proven to be overwhelmingly ineffective in ensuring that students have access to minimally adequate schools, despite decades of effort.[238] State judge inaction obstructs "efforts to remove barriers to equal education

[230] HOLLAND ET AL., *supra* note 229, at 598 (noting that many of these cases criticized funding mechanisms as insufficient for guaranteeing educational opportunities to all children and families).

[231] *See* Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1012–15 (2001).

[232] Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 230 (2002).

[233] *See, e.g.*, Linda Conner Lambeck, *State Supreme Court Reverses Lower Ruling on Education Funding*, CT POST (Jan. 18, 2018), https://www.ctpost.com/local/article/State-wins-school-funding-case-12505168.php [https://perma.cc/HXR8-LAEW] (describing a state minimal educational claim that won at trial but was overruled by the appellate court shortly thereafter).

[234] *See* Simon-Kerr & Sturm, *supra* note 32, at 83–84.

[235] Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y 346, 348–49 (2018). Even in a rare instance where the state court specified a remedy for an educational adequacy violation, the same court later "enabled the legislature to stray considerably from [its] direction." *Id.* at 350.

[236] *See generally* Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949 (2014) (providing background on foregoing remedies in adequate education suits).

[237] Weishart, *supra* note 235, at 347 (finding that six states denied legal remedies for student plaintiffs throughout the 1990s and early 2000s, downgrading the right to education and avoiding judicial review). For a recent specific example of a state court declining to grant a remedy to student-plaintiffs who alleged a state constitutional violation of their education rights, see Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 176 A.3d 28, 75 (Conn. 2018).

[238] *See* Kimberly Jenkins Robinson & Charles J. Ogletree, *Inequitable Schools Demand a Federal Remedy*, 17 EDUC. NEXT 71, 74 (2017).

opportunities for low-income and minority students."[239] The federal judiciary, on the other hand, has a proven track record in improving the achievement gap and in diversifying isolated student populations within the public school system through court-ordered integration efforts.[240] No other educational solution has been able to effect system-wide improvements to a comparable degree.[241] Federal judicial intervention works, and district court judges should intervene again.

B. *What the Federal Judiciary Should Order*

Few enduring examples of inter-district school integration exist today.[242] While voluntary socioeconomic integration programs have increased in recent years, they are typically confined to operating within a single school district.[243] Since most urban segregation occurs not within but *across* districts,[244] single-district solutions are limited in the extent to which they can redistribute school compositions. But an ongoing effort to integrate public education across district boundaries in Connecticut provides a useful template for facilitating an inter-district integration program and offers data on the results such an effort can produce. Federal judges should look to the Connecticut program as a guide when prescribing remedies and overseeing local school district efforts.

[239] *Id.*

[240] *See supra* Part III.

[241] *See* Schmitz, *supra* note 71, at 1640.

[242] *See, e.g.*, *The Problem We All Live With*, *supra* note 113. One recent example of inter-district school integration occurred in Normandy, Missouri. *Id.* After Normandy Public School District (NPSD) lost its accreditation, an antiquated state law afforded students the option to attend a suburban school district thirty miles away through a busing program. *Id.* Over one thousand students opted to participate before the state reversed the accreditation status of NPSD and ended the program. *Id.*; *see also This American Life: The Problem We All Live With—Part Two*, CHI. PUB. RADIO (Aug. 7, 2015), https://www.thisamericanlife.org/563/transcript [https://perma.cc/33W4-4MP2] (providing further reflection on school district segregation in part two of this podcast).

[243] For example, the State of New York initiated an effort to increase diversity at low-performing New York City Public Schools through a socioeconomic integration pilot program. The state announced a competitive grant program after voluntary diversity efforts in Brooklyn's District 13 experienced initial success. Geoff Decker, *In Brooklyn's District 13, A Task Force Aims to Engineer Socioeconomic Integration*, CHALKBEAT (Feb. 12, 2014), https://ny.chalkbeat.org/posts/ny/2014/02/12/in-brooklyns-district-13-a-task-force-aims-to-engineer-socioeconomic-integration/ [https://perma.cc/R9KG-NM4U].

[244] Rich Scinto, *School Segregation in Connecticut: What the Data Shows*, PATCH (Jan. 10, 2018), https://patch.com/connecticut/monroe/school-segregation-connecticut-what-data-shows [https://perma.cc/4HPJ-G2Z6].

1. *The Hartford, Connecticut Program Model*

In 1997, Connecticut passed a bipartisan bill outlining mechanisms for school integration in Hartford[245] after the Connecticut Supreme Court ruled that Hartford schools violated students' education rights under the state's constitution.[246] Though the court did not mandate a specific remedy to resolve the extreme disparities within the state's public education system,[247] the general assembly designed a program to integrate the schools.[248] The resulting statewide inter-district public school "Open Choice" program[249] was adopted to improve academic achievement and to reduce racial, ethnic, and economic educational disparities.[250]

The State Board of Education funds the Open Choice program, while three agencies, including the Capitol Region Education Commission, have authority to operate the program and carry out its objectives.[251] The program centers on the establishment of inter-district magnet schools.[252] These schools serve students across district lines as well as public school students who reside within

[245] Taylor Kennedy, *The Effects of* Sheff v. O'Neill *on Hartford Schools* (May 5, 2017), https://commons.trincoll.edu/edreform/2017/05/the-effects-of-sheff-v-oneill-on-hartford-schools/ [https://perma.cc/W2X8-7H8S].

[246] Because the Connecticut Constitution "contemplates free public elementary and secondary schools that, at the least, are minimally adequate" and also includes explicit anti-segregation and anti-discrimination clauses, the Court held that the state had the authority "to integrate students by class and race." Lincoln Caplan, *Two Connecticut School Systems, For the Rich and Poor*, NEW YORKER (Sept. 14, 2016), https://www.newyorker.com/news/news-desk/two-connecticut-school-districts-for-the-rich-and-poor [https://perma.cc/2DS9-7TCQ] (internal quotations omitted).

[247] Many blamed the court for not ordering a compulsory remedy. *See* Rachel M. Cohen, *Desegregated, Differently*, AM. PROSPECT (Oct. 18, 2017), https://prospect.org/article/desegregated-differently [https://perma.cc/Q5M7-9Z83].

[248] *See* GARY ORFIELD & JONGYEON EE, CONNECTICUT SCHOOL INTEGRATION: MOVING FORWARD AS THE NORTHEAST RETREATS 10–12 (2015). Connecticut is one of the wealthiest states, and it has a disproportionately low number of children who qualify for federally subsidized or free school lunches. Even still, the "comparative inequality in racial exposure to poor students is more extreme in Connecticut" compared to national averages; minority students are three times likelier to be poor than their white peers, who are "overwhelmingly middle class." *Id.* at 29.

[249] The general assembly's first attempt at addressing school integration was unsuccessful. Eventually, Connecticut Governor Rowland intervened and worked with the legislature to pass this voluntary, inter-district program. CONN. SCH. FIN. PROJECT, GUIDE TO CONNECTICUT'S MAGNET SCHOOLS 4 (Nov. 2018).

[250] *Id.* at 13.

[251] *See About Open Choice*, CAPITOL REGION EDUC. COUNCIL, http://www.crec.org/choice/ [https://perma.cc/6BCF-R5VZ].

[252] A "magnet" school is so termed because it is "intended to attract students away from their neighborhood schools." Their key characteristics include a specialized school curriculum or theme, voluntary enrollment, and a student body hailing from many attendance zones. Price & Stern, *supra* note 218, at 292.

the district where the magnet school is located.[253] Students can choose to attend specialized schools in more than thirty surrounding districts through a lottery.[254] This new system allowed the state to close chronically under-performing schools and replace them with high-quality alternatives.[255]

The plan is funded by a multi-tier budget mechanism. First, competitive grants support construction of state-of-the-art magnet schools in Hartford and nearby districts (New Haven and Bridgeport, in particular).[256] Second, per-student state allocations fund districts receiving students who live outside their borders.[257] Additional incentives attach to these allocations for any district that increases its Open Choice enrollment,[258] and schools that serve high percentages of non-resident students also receive increased funding.[259] Third, per-student losses are capped so that sending districts who lose students do not sustain crippling budget deficits.[260] Finally, the state provides transportation funding for Open Choice students.[261]

Today, Connecticut offers ninety-one inter-district magnet schools.[262] Over 22,000 Hartford students attend integrated schools,[263] which is nearly half of the school district's total population.[264] Statewide, about 40,000 students participate.[265] These statistics represent a more than doubling of students who attend integrated schools across the state in just under twenty years.[266]

[253] CONN. SCH. FIN. PROJECT, *supra* note 249, at 6.

[254] CONN. SCH. FIN. PROJECT, CONNECTICUT'S OPEN CHOICE PROGRAM: POLICY BRIEFING 3, 8–9 (May 2018), http://ctschoolfinance.org/assets/uploads/files/Open-Choice-Policy-Brief.pdf [https://perma.cc/67MC-53BQ] (explaining that lotteries are weighted to preserve or enhance heterogeneous school composition among the participating districts).

[255] Christine Campbell & Betheny Gross, *Improving Student Opportunities and Outcomes in Hartford Public Schools*, CTR. REINVENTING PUB. EDUC. 3 (June 2013), https://www.crpe.org/sites/default/files/Pub_EvidenceProject_Hartford_jul13.pdf.pdf [https://perma.cc/G6EJ-97GP].

[256] CONN. SCH. FIN. PROJECT, *supra* note 249, at 13–16 ("Interdistrict magnet school building projects developed for the purposes of increasing diversity are eligible to have up to 80 percent of the costs of construction reimbursed by the State.").

[257] CONN. SCH. FIN. PROJECT, *supra* note 254, at 4–6.

[258] *Id.*

[259] CONN. SCH. FIN. PROJECT, *supra* note 249, at 13.

[260] *See* CONN. SCH. FIN. PROJECT, *supra* note 254, at 5.

[261] CONN. SCH. FIN. PROJECT, *supra* note 249, at 16.

[262] *Id.* at 6.

[263] Martin & McClellan, *supra* note 209.

[264] *See Progress in Hartford Schools, But Illegal Segregation Persists*, *supra* note 218.

[265] CONN. SCH. FIN. PROJECT, *supra* note 249, at 6.

[266] Prior to the integration program, less than 17% of Hartford students attended integrated schools; by 2008, that number rose to 43%. Lucretia Anne Witte, Can School Integration Increase Student Achievement? Evidence from Hartford Public Schools 11 (Apr. 12, 2016) (unpublished M.P.P. thesis, Georgetown University), https://repository.library.georgetown.edu/bitstream/handle/10822/1040840/Witte_georgetown_0076M_13272.pdf?sequence=1&isAllowed=y [https://perma.cc/XLT4-HCXS].

Commensurate with these demographic improvements, student achievement has improved by significant margins. For example, minority students who attend Hartford's integrated schools have increased their reading proficiency rates by 10.9%.[267] Poor students in Hartford's integrated schools perform substantially above statewide averages for low-income students.[268] Graduation rates have also improved.[269] These academic gains are attributable to replacing chronically low-performing schools with redesign schools, which show significant improvements in reading scores.[270] In roughly one generation, the Open Choice program has helped close the state's significantly under-performing schools and raised student literacy rates by creating strategically located, high-quality magnet schools in high-poverty neighborhoods.[271]

A similar program is viable in nearly any state or community,[272] as model variations can accommodate a wide range of local education challenges and community preferences. Indeed, a variety of geographic areas have implemented pilot integration programs to address their respective, individualized needs.[273] Cities or regions that need to address only a few discrete unconstitutional schools[274] may be able to rectify them by transitioning just those schools into inter-district magnet programs. Lansing, Michigan; Raleigh, North Carolina; and Cambridge, Massachusetts have all successfully redressed their failing schools using this approach, which has diversified school demographics and improved student literacy outcomes.[275] Cities or regions with numerous or systemic unconstitutional schools[276] can implement a more robust inter-district model, with collaboration between multiple districts and the state. Both Omaha, Nebraska[277] and the State of New York have recently adopted this

[267] *Id.* at 27–32. Data also reveal a positive correlation between time a student spends in integrated schools and improved academic outcomes. Kimberly Quick, *Hartford Public Schools: Striving for Equity through Interdistrict Programs*, CENTURY FOUND. (Oct. 14, 2016), https://tcf.org/content/report/hartford-public-schools/?agreed=1 [on file with *Ohio State Law Journal*].

[268] Quick, *supra* note 267.

[269] CAMPBELL & GROSS, *supra* note 255, at 14.

[270] *Id.* at 9–11, 15.

[271] *Id.* at 3.

[272] *See* Kahlenberg, *supra* note 52, at 263–79.

[273] *See* Richard D. Kahlenberg, *School Integration in Practice: Lessons from Nine Districts*, CENTURY FOUND. (Oct. 14, 2016), https://tcf.org/content/report/school-integration-practice-lessons-nine-districts/ [on file with *Ohio State Law Journal*].

[274] *See, e.g.*, *infra* Appendix B.

[275] Richard D. Kahlenberg, *Turnaround Schools that Work: Moving Beyond Separate But Equal*, CENTURY FOUND., 6–7 (Nov. 12, 2009), https://tcf.org/assets/downloads/tcf-turnaround.pdf [https://perma.cc/F4CJ-G6A4].

[276] *See, e.g.*, *infra* Appendices A and D.

[277] WAGNER, *supra* note 36, at 18. In Omaha, eleven districts across the metropolitan area merged their funding to offer cross-district transfer school options to students in order to increase school diversity. *Id.*

type of approach.[278] When the Court considers how to design remedies for the right to access literacy education, it should look to the Open Choice program as a practical, effective, and flexible model that can remedy unconstitutional schools in a wide range of geographic areas and educational landscapes.

2. *Federal Court Mechanisms for Implementation*

Moreover, federal judges should order and oversee inter-district programs because nearly two-thirds of segregation occurs between districts, not within districts.[279] This reality can be addressed by a court-ordered, inter-district transfer plan similar to the one that has been successful in Hartford. Like the Hartford model, such a plan would necessarily consist of two parts: (1) offering magnet schools in low-SES neighborhoods to attract students from nearby, more affluent districts, and (2) including an incentive payment scheme to encourage affluent districts to enroll low-SES students.[280] This type of "controlled choice" maximizes socioeconomic integration within and across school districts while also respecting parental choice of schools.[281]

To oversee the design and implementation of these programs and their funding streams, district court judges can appoint "special masters."[282] The federal judiciary commonly employs special masters to help manage remedies in complex civil cases by addressing judicial limitations and helping to implement equitable decrees in public institutional reform.[283] Non-attorney special masters, who offer specialized knowledge in a needed field or subject, often oversee post-trial activity, such as monitoring compliance with a court order.[284] In fact, special masters oversaw the post-*Brown* desegregation decrees in the 1970s and 1980s.[285] Special masters with both educational expertise and mediation skills would be well-poised to facilitate agreement among local school districts and state education officials; to preserve local educational autonomy and decision-making authority; and to ensure that the judicial remedy comes to fruition.

To support a geographic region in developing the specific details of a locally tailored integration program, the special master can utilize design strategies that increase the likelihood of a program's success, including incorporating

[278] *Id.* at 19. These programs were implemented only recently, as pilots supported by a one-time federal grant. *Id.*

[279] Ann Owens et al., *Income Segregation Between Schools and School Districts*, 53 AM. EDUC. RES. J. 1159, 1161, 1177 (2016).

[280] *See* Basile, *supra* note 224, at 130.

[281] *See id.*

[282] *See* FED. R. CIV. P. 53(a)(1)(C).

[283] *See* Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 396–98 (1986).

[284] *See* THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., SPECIAL MASTERS' INCIDENCE AND ACTIVITY 39–41 (2000).

[285] *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482–86 (1976).

community input and offering choices to families in school assignment plans.[286] Because the special master can oversee the remedy on behalf of the court while empowering local educational control throughout the design and implementation processes, this role is a critical element of court-ordered inter-district integration orders. While judicial decrees and the special masters who effectuate them are unlikely to eliminate entirely disparate school populations and the academic achievement gap in today's American schools, they can utilize a practical, proven strategy for facilitating the end of our lowest-performing, unconstitutional schools.

VI. CONCLUSION

For now, Gary B. has no option but to attend school each day at a racially and socioeconomically segregated institution, where none of the students have gained proficiency in core subject areas.[287] Reports condemning Detroit for its educational failures have been in the public eye for decades[288] and continue today,[289] but state and local education officials have not been successful in resolving them. Detroit students have requested relief from the state court system, but it has been similarly ineffectual.[290] In today's educational landscape, kids who want the opportunity to attain the literacy skills they need for democratic participation have turned to the federal judiciary for help.

As the Court considers whether to acknowledge a right to access literacy education, it will no doubt consider the administrability of a corresponding remedy. That question, however, is fairly easy to resolve. District court judges made substantial progress towards securing the *Brown* race-based right to education throughout the 1970s and '80s by issuing orders and using special masters to oversee school district efforts to integrate. Those efforts cultivated transformative academic gains for minority and low-income students in just a single generation. Since that time, no other attempt has guaranteed that all

[286] *See* WAGNER, *supra* note 36, at 18 (presenting The Center for Public Education's recommended best practices and policy solutions for implementing public school integration programs).

[287] Complaint, *supra* note 3, at 65.

[288] *See generally* Leanne Kang, The Dismantling of an Urban School System: Detroit, 1980–2014 (2015) (unpublished Ph.D. dissertation, University of Michigan), https://lsa.umich.edu/content/dam/sid-assets/SID%20Docs/The%20Dismantling%20of%20an%20Urban%20School%20System.pdf [https://perma.cc/8FGS-M5QR] (outlining the history of Detroit's school system and its repeated failures to provide an adequate education to its students).

[289] Lori Higgins, *Detroit's Schools Score Worst in the Nation Again, but Vitti Vows that Will Change*, DET. FREE PRESS (Apr. 10, 2018), https://www.freep.com/story/news/education/2018/04/10/detroit-schools-again-worst-nation-rigorous-national-exam-while-michigan-overall-sees-no-significant/493893002/ [https://perma.cc/A8WG-P2NL].

[290] *See* Michael F. Addonizio, *From Fiscal Equity to Educational Adequacy: Lessons from Michigan*, 28 J. EDUC. FIN. 457, 483 (2003).

kids—regardless of their race, class, or neighborhood—can universally attend minimally adequate schools. If our country is genuinely committed to providing educational opportunities for *all* its children, federal judges must act. Their intervention is the only proven remedy for our unconstitutional schools.

APPENDIX A[291]

Baltimore, Maryland[292]

School that Does Not Provide Minimal Access to Literacy Education	Proficiency Rate	Minority Enrollment [293]	Low Income Enrollment [294]	Students Enrolled
Academy for College and Career	**1.3%**	98.0%	100.0%	513
Achievement Academy at Harbor City	**0.0%**	98.4%	100.0%	343
Arundel Elementary/Middle	**3.2%**	99.4%	98.5%	343
Augusta Fells Savage Institute	**5.4%**	99.7%	98.5%	480
Baltimore Design School	**5.1%**	95.6%	89.1%	510
Banneker Blake Academy	**5.6%**	100.0%	100.0%	260
Bluford Drew Jemison STEM Academy	**0.8%**	98.6%	100.0%	379
Booker T. Washington Middle School	**1.6%**	98.1%	100.0%	220
Brehms Lane Public Charter School	**5.9%**	98.4%	100.0%	680
Calverton Elementary/Middle	**0.0%**	98.3%	99.1%	646
Carver Vocational-Technical High	**2.9%**	99.2%	98.5%	891
Cherry Hill Elementary/Middle	**4.4%**	99.0%	100.0%	457
Coldstream Park Elementary	**4.3%**	98.9%	100.0%	266
Collington Square Elementary	**5.8%**	99.4%	99.0%	340

[291] Author-created appendices. Because the *Gary B.* argument does not define minimal access to literacy education in terms of proficiency benchmarks, this Note aggregates data assuming that schools with 6% proficiency or less would satisfy any future court criterion. The figures present school report card data, which identify student literacy proficiency rates based on state-administered standardized assessments.

[292] *2018 Maryland School Report Cards*, MD. ST. DEP'T OF EDUC., https://msp2018.msde.maryland.gov/ [https://perma.cc/S6AE-4SFF] (enter school name in search bar).

[293] School Performance Data, SCHOOLDIGGER, https://www.schooldigger.com [https://perma.cc/9F5N-XPN4] (select Maryland from U.S. map; then search school lookup field by school name). Maryland state report cards do not include student enrollment data on race or socioeconomic status.

[294] *Id.* (defining low-income students as those who qualify for free or reduced-cost lunch through federal subsidies).

School that Does Not Provide Minimal Access to Literacy Education	Proficiency Rate	Minority Enrollment	Low Income Enrollment	Students Enrolled
ConneXions: A Community Based Art	**3.5%**	99.6%	100.0%	481
Curtis Bay Elementary	**1.9%**	60.5%	98.4%	559
Dallas F. Nicholas Sr. Elementary	**3.0%**	100%	100.0%	274
Dorothy I. Height Elementary School	**2.6%**	97.5%	100.0%	319
Dr. Bernard Harris Sr. Elementary	**2.9%**	98.6%	100.0%	352
Dr. Carter Godwin Woodson	**1.0%**	99.5%	100.0%	361
Dr. Martin Luther King, Jr. Elementary	**5.0%**	99.7%	100.0%	306
Edgewood Elementary	**3.3%**	97.0%	100.0%	219
Eutaw-Marshburn Elementary	**0.0%**	97.3%	100.0%	296
Forest Park High	**4.2%**	98.1%	96.8%	623
Fort Worthington Elementary	**4.3%**	99.3%	100.0%	684
Frederick Douglass High	**3.4%**	99.1%	99.4%	906
Frederick Elementary	**4.3%**	92.5%	98.0%	466
Friendship Academy of Engineering	**4.8%**	98.5%	90.1%	306
Garrett Heights Elementary/Middle	**5.5%**	91.9%	95.7%	389
Gilmor Elementary	**2.2%**	99.2%	100.0%	264
Guildford Elementary/Middle	**5.2%**	95.5%	99.0%	311
Harlem Park Elementary	**1.2%**	99.2%	100.0%	334
Hazelwood Elementary/Middle	**3.1%**	97.3%	100.0%	465
James McHenry Elementary	**4.9%**	97.8%	82.9%	389
Lillie May Carroll Jackson School	**0.0%**	99.4%	78.3%	197
Knowledge and Success Academy	**5.9%**	97.2%	100.0%	370
Matthew A. Henson Elementary	**2.0%**	99.7%	100.0%	360
N.A.C.A. Freedom and Democracy II	**1.7%**	98.7%	87.2%	223
New Era Academy	**0.0%**	93.7%	95.6%	334
Patterson High	**2.1%**	92.4%	77.3%	1,103
Reginald F. Lewis High School	**5.0%**	98.8%	90.1%	564

School that Does Not Provide Minimal Access to Literacy Education	Proficiency Rate	Minority Enrollment	Low Income Enrollment	Students Enrolled
Renaissance Academy	**2.7%**	98.6%	100.0%	246
Robert W. Coleman Elementary	**2.5%**	100.0%	100.0%	336
Rognel Heights Elementary/Middle	**5.3%**	100.0%	100.0%	250
Roots and Branches School	**4.8%**	96.7%	98.7%	156
Sarah M. Roach Elementary	**5.9%**	95.2%	100.0%	235
Samuel Coleridge-Taylor School	**3.1%**	95.2%	100.0%	357
The Reach! Partnership Academy	**3.1%**	99.1%	100.0%	526
Waverly Elementary	**5.8%**	98.4%	100.0%	640
William Pinderhughes Elementary	**5.0%**	100.0%	100.0%	263

Total Students: 20,792

Percent of Students Enrolled in an Unconstitutional School: 26.2%[295]

[295] Baltimore City Schools serves 79,297 total students. *City Schools at a Glance*, BALT. CITY PUB. SCHS., https://www.baltimorecityschools.org/district-overview [https://perma.cc/ACD3-HJWT].

APPENDIX B

Columbus, Ohio[296]

School that Does Not Provide Minimal Access to Literacy Education	Proficiency Rate[297]	Minority Enrollment	Low Income Enrollment	Students Enrolled
Trevitt Elementary School	**2.1%**	94.4%	100.0%	234
Windsor STEM Academy	**5.6%**	94.7%	100.0%	413

Total Students: 647

Percent of Students Enrolled in an Unconstitutional School: 1.3%[298]

[296] *School Overview*, OHIO SCH. REP. CARDS, https://reportcard.education.ohio.gov [https://perma.cc/DAT9-ZRFR] (enter school name in search bar).

[297] The *Gary B.* case argues for a right to minimal access to literacy education, but the Complaint also cites the extreme low performance of students in other subject areas, such as math and science. *See supra* Part IV. If the right to a minimally adequate education were expanded to include at proficiency in mathematics, the figure above would be drastically different. For example, in Columbus City Schools, six additional schools have achieved mathematical proficiency in less than 6% of students, implicating an additional 3532 students. By this measure, 8.19% of Columbus City Schools students attend an unconstitutional school.

[298] Columbus City Schools serves approximately 51,000 students. *See* COLUMBUS CITY SCHS., https://www.ccsoh.us/domain/154 [https://perma.cc/4CAV-Y5KP].

APPENDIX C

Memphis, Tennessee[299]

School That Does Not Provide Minimal Access to Literacy Education	Proficiency Rate[300]	Minority Enrollment	Low Income Enrollment	Students Enrolled
Aspire Henley Elementary	**5.3%**	100.0%	78.8%	495
Aspire Middle School	**5.3%**	99.6%	**77.8%**	225
Cummings Elementary	**5.7%**	100.0%	86.4%	493
Douglass High School	**5.6%**	100.0%	Unavailable	476
Dubois Middle School of Arts Technology	**< 5.0%**	98.7%	73.4%	158
Fairley High School	**5.0%**	99.4%	74.2%	519
Grad Academy Memphis	**< 5.0%**	99.8%	69.3%	479
Geeter Middle School	**5.5%**	100.0%	81.5%	276
Hamilton High School	**< 5.0%**	99.7%	83.0%	622
Hawkins Mill Elementary School	**5.3%**	98.7%	89.1%	312
Hilcrest High School	**5.8%**	98.9%	71.5%	442
KIPP Memphis Collegiate High School	**5.4%**	98.6%	64.5%	515
Kirby High	**5.1%**	99.4%	59.2%	894
Martin Luther King Preparatory School	**5.8%**	98.6%	78.3%	576
Melrose High School	**5.8%**	99.7%	73.6%	587
Memphis Scholars Raleigh-Egypt	**5.6%**	100.0%	49.5%	99
Northwest Prep Academy	**< 5.0%**	100.0%	79.9%	159
Oakhaven Middle School	**5.4%**	99.0%	71.6%	310
Sheffield Elementary	**5.4%**	99.0%	72.6%	594
Trezevant High	**< 5.0%**	99.4%	79.8%	544
Westside Achievement Middle School	**5.1%**	94.9%	99.7%	296

Total Students: 9,071

Percent of Students Enrolled in an Unconstitutional School: 9.1%[301]

[299] *Shelby County Public Schools*, TENN. DEP'T EDUC., https://reportcard.tnk12.gov/ [https://perma.cc/8KXX-3WCW] (select Shelby County from State map; toggle search to School; enter school name in search bar).

[300] Tennessee school report cards do not list precise proficiency rates when they fall below 5%.

[301] Shelby County Public Schools serve approximately 100,000 students. *See* SHELBY COUNTY PUB. SCHS., http://www.scsk12.org/about/ [https://perma.cc/DLA8-EXMB].

APPENDIX D

Oakland, California[302]

School that Does Not Provide Minimal Access to Literacy Education	Distance From Standard[303]	Minority Enrollment	Low Income Enrollment	Students Enrolled
Alliance Academy	**- 114.0**	99.2%	96.1%	358
Castlemont High School	**- 191.3**	99.3%	93.7%	858
Community United Elementary	**- 106.3**	97.5%	96.2%	368
Fremont High School	**- 146.2**	97.9%	95.5%	827
Frick Middle School	**- 126.8**	99.1%	94.3%	227
Fruitvale Elementary School	**- 116.7**	95.9%	88.3%	367
Hoover Elementary	**- 110.4**	92.1%	95.7%	278
Horace Mann Elementary	**- 113.4**	98.0%	94.8%	345
Markham Elementary School	**- 119.5**	99.1%	97.6%	340
Oakland International High School	**- 203.8**	92.9%	97.0%	370
ROOTS International Academy	**- 111.5**	96.4%	98.4%	309
West Oakland Middle School	**- 106.9**	91.6%	96.5%	202
Westlake Middle School	**- 102.5**	95.3%	85.6%	360

Total Students: 5,209

Percent of Students Enrolled in an Unconstitutional School: 14.4%[304]

[302] *Oakland Unified District*, CAL. SCH. DASHBOARD, https://www.caschool dashboard.org/ [https://perma.cc/VE94-A7SA] (enter school name in search bar).

[303] California public school report cards do not include proficiency percentages. Instead, they aggregate the "Distance from the Standard" (DFS), which is the deviation from the lowest possible score for meeting the standard, for each student. The DFS is then averaged for the school. *See Academic Indicator*, CAL. SCH. DASHBOARD (Nov. 2018), https:// www.cde.ca.gov/ta/ac/cm/documents/academicindicator.pdf [https://perma.cc/D3YL -JTK5]. The state indicates that a school is in "Very Low" status when the DFS for English Language Arts assessments is below 70.1 points and when the school declined by more than 15 points from the prior year. This Appendix includes only those schools with a DFS average of negative 100 points or more. *See 2018 California School Dashboard Technical Guide FINAL VERSION: 2018–19 School Year*, CAL. DEP'T EDUC. (Dec. 2018), https://www.cde.ca.gov/ta/ac/cm/documents/dashboardguide18.pdf [https://perma.cc/ 4HQP-HXK5].

[304] Oakland Unified School District serves 36,286 students. *Fast Facts 2018-19*, OAKLAND UNIFIED SCH. DISTRICT (Dec. 14, 2019), https://www.ousd.org/cms/lib/ CA01001176/Centricity/Domain/105/Fast%20Facts%20-%202018-19%20-%20OUS D%20Districtwide.pdf [https://perma.cc/3RMN-MZRN].